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No. - .



# In the

# Supreme Court of the United States.

OCTOBER TERM, 1987.

UNITED AUTO WORKERS, LOCAL 422,
PETITIONER,

*v.*

AUGUSTINO TOSTI,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

**Petition for Writ of Certiorari.**

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## Questions Presented for Review.

I. Whether the plaintiff's cause of action is pre-empted by the National Labor Relations Act in view of the risk it poses of interference with the jurisdiction of the National Labor Relations Board.

II. Whether, upon an independent assessment of the evidence of "actual malice" introduced by the plaintiff, the plaintiff's evidence was insufficient to establish with clear and convincing clarity that the Union official knew that his statement was false, or that the Union official acted with reckless disregard of whether the statement was false or not, and, whether an inference of "actual malice" can be held to arise from the Union official's desire to enforce the collective bargaining agreement.

III. Whether an award of damages in the amount of $275,000.00 (with interest in the amount of $428,187.17) in this defamation action is clearly excessive and unsupported by competent evidence in the record where (1) no evidence of the value of the plaintiff's allegedly lost employment benefits was presented by the plaintiff; (2) the Supreme Judicial Court characterized the plaintiff's evidence of harm to reputation and mental suffering as "sparse indeed"; (3) the jury returned a verdict of only $5,000.00 against the author of the alleged libel for which the Union was only liable vicariously; and (4) the jury clearly was motivated by animus toward unions because it was prepared to hold the Union liable regardless of whether any Union official had committed any wrong against the plaintiff.

**Parties to the Proceeding.**

Petitioner, which was the defendant-appellant in the Supreme Judicial Court, is United Auto Workers, Local 422 ("the Union"). Although not parties to the 1986 appeal to the Supreme Judicial Court, Henry Ayik and Baheege Ayik were defendants in the action who were sued individually and in their capacities as officials of the Union.

Respondent, who was the plaintiff-appellee in the Supreme Judicial Court, is Augustino Tosti.

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## Petition for Writ of Certiorari.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, United Auto Workers, Local 422, appellant in the court below, respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts in the above case.

## Opinions Below.

The opinions of the Supreme Judicial Court are published as *Tosti* v. *Ayik*, 400 Mass. 224, 508 N.E.2d 1368 (1987) ("*Tosti III*") (reproduced at page 1a in Appendix A); as *Tosti* v. *Ayik*, 394 Mass. 482, 476 N.E.2d 928 (1985) ("*Tosti II*")

(reproduced at page 7a of Appendix B); and *Tosti* v. *Ayik*, 386 Mass. 721, 437 N.E.2d 1062 (1982) ("*Tosti I*") (reproduced at page 27a of Appendix C). No opinions were delivered in the Superior Court action.

**Jurisdictional Statement.**

The final judgment of the Supreme Judicial Court was entered on June 10, 1987. *See* Appendix D, p. 36a. The Union's petition for rehearing was denied on July 2, 1987. *See* Appendix E, p. 37a. The jurisdiction of the Supreme Court to review the final judgment of the Supreme Judicial Court is invoked pursuant to 28 U.S.C. § 1257(3).

**Statutory Provision.**

Title 29, United States Code, Section 158(b)(1)(B):

> It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . .

**Statement of the Case.**

This case presents stark confirmation of the prescience of this Court's statement that "the availability of libel actions may pose a threat to the stability of labor unions." *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53, 64 (1966). In fact, this single defamation action portends the imminent demise of the petitioner, Local 422 of the United Auto Workers, a local union that has been in existence since about 1947. The Supreme Judicial Court affirmed a libel award in the amount of $703,187.17 ($275,000.00 plus $428,187.17 in interest) against the Union, and an execution issued against the Union in the amount of $819,226.95 on or about July 20, 1987.

Recognizing the substantiality of the issues presented in this case, the Supreme Judicial Court, per Chief Justice Hennessey, ruled on August 7, 1987 that the execution issued against the Union should be superseded and that enforcement of the judgment against the Union should be stayed pending the filing and disposition of the Union's Petition to this Court for a Writ of Certiorari. *See* Appendix F, pp. 38a-39a.[1] The Supreme Judicial Court apparently also took cognizance of the Union's claim that enforcement of the judgment prior to the disposition of the Union's Petition for a Writ of Certiorari might result in irreparable harm to the Union; namely, that the magnitude of the judgment would require the Union to file a petition in bankruptcy. The effect of the Supreme Judicial Court's allowance of the Union's motion for a stay was to permit the Union to remain a viable entity, at least until this Court decides whether to grant its Writ of Certiorari to review the Supreme Judicial Court's decision.

This action was commenced by the plaintiff Augustino Tosti ("Tosti"), a former supervisor of the General Motors Corporation ("GM") plant in Framingham, Massachusetts, on August 6, 1973.[2] Tosti sought to recover from Henry Ayik, his brother Baheege Ayik, and United Auto Workers, Local 422 for libel and for intentional interference with Tosti's employment relationship with GM. Tosti alleged in his Declaration that the publication of a certain article written by Henry in the Union newspaper caused GM to terminate him from his supervisory position, resulted in the loss of job-related benefits, and caused harm to Tosti's reputation and mental suffering.

The article was written by Henry Ayik with the conceded purpose of attempting to enforce Paragraph 215 of the Union's

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[1] The standard for issuing a stay pursuant to 28 U.S.C. § 2101(f) is that a stay will generally issue where (1) there is a "reasonable probability" that four Justices of this Court will find the issue sufficiently substantial to grant certiorari; (2) there is a "fair prospect" that a majority of this Court will conclude that the decision was erroneous; (3) irreparable harm is likely to result to the applicant if a stay is not granted; and (4) the "balance of equities" to the parties and the public favors the issuance of a stay. *See In re Roche*, 448 U.S. 1312, 1314 (1980) (Brennan, J., in chambers).

[2] The statement of the facts that follows is derived from testimony given at the second trial of this case in March of 1983.

collective bargaining agreement with GM.[3] Paragraph 215 of the collective bargaining agreement provided that GM supervisors shall not perform work on hourly-rated jobs except in emergencies or in the instruction or training of employees. The article concerned Henry's observation of the plaintiff on the night of June 7, 1971, punching repair tickets on vehicles in direct violation of Paragraph 215.[4] Supervisory employees were not issued repair punches and were not authorized to punch repair tickets to indicate that repairs had been completed. Nonetheless, Tosti admitted that he used the repair punches in an unauthorized manner on approximately fifteen to twenty vehicles in 1971. Henry testified that he had seen Tosti on several occasions in April and May of 1971 punching repair tickets on vehicles without ever performing any repairs. Tosti claimed that he did not work the same shift as Henry in April or May of 1971.

On the evening of June 7, 1971, Henry observed Tosti punching repair tickets on six vehicles in a row. Henry wrote down the job numbers of the vehicles and advised Tosti that he was going to file a grievance. Although Henry acknowledged that he was not present for approximately fifteen minutes prior to his viewing of the incident, he testified that, based upon his experience, the repairs could not have been performed in so little an amount of time. Numerous GM employees corroborated Henry's testimony by testifying that they too had seen Tosti punching repair tickets without ever seeing Tosti

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[3] The article, in its entirety, stated as follows: "On Monday, June 7th [1971,] at 11:34 P.M. Gus Tosti foreman in the electrical hole, was working on job #603677, a green 4 door Pontiac, T37. Pete Hanningson (rank unknown) was standing guard next to him. This is how Gus repairs cars. He has an inspection punch, #K2 and if he reverses the punch it's K5. He was punching all the items on the ticket. This sort of thing goes on constantly. We have men who work in the Inspection Department checking these cars for defects. After writing the defects down the foremen fix them by punching the ticket out. Now, I understand why so many cars are shipped from the electrical hole. GM's mark of excellence means nothing to them. If you're ever picked as a driver for the electrical hole first, blow the horn, next try the brakes and good luck!!"

[4] The plaintiff conceded that he punched repair tickets in violation of the Union's contract with GM. He claimed at trial, however, that he never punched a repair ticket on a vehicle that he did not repair.

performing repairs. The GM plant personnel director testified that on June 16, 1971, Tosti admitted that he had used the repair punch to ship vehicles that were not actually repaired. An independent investigation by GM revealed that nearly one hundred unrepaired vehicles had been punched with the K-2 punch between June 1, 1971 and June 15, 1971, including four vehicles which had been shipped with serious safety violations. Tosti was then informed on June 18, 1971 by GM that he was to be discharged for punching repair tickets on unrepaired vehicles.[5]

A jury trial commenced on February 11, 1980. On February 15, 1980, the jury returned verdicts against Henry, Baheege, and the Union for libel and intentional interference with Tosti's contractual relationship with GM in the amount of $420,000.00. On the same day, judgments entered on the jury's verdict in the amount of $420.000.00, together with interest in the amount of $211.428.00.

The Ayiks and the Union appealed the decision to the Supreme Judicial Court, which reversed the judgment and ordered a new trial for all defendants. *Tosti I*, 386 Mass. 721. The court held that Henry's article was published in the context of a labor dispute because the dispute concerned a controversy over supervisory personnel doing bargaining unit work in violation of the Union's collective bargaining agreement with GM. *Tosti I*, 386 Mass. at 723-726. Since the trial court did not instruct the jury in accordance with this Court's decision in *Linn*, 383 U.S. 53, that the plaintiff could not recover from the defendants unless he showed that Henry's statement was published with "actual malice," the Supreme Judicial Court reversed the judgment in Tosti's favor on the defamation counts. *Tosti I*, 386 Mass. at 725. The Supreme Judicial Court also reversed the judgments in Tosti's favor on his claims for intentional interference with his employment relationship. The Court held that the National Labor Relations Act ("NLRA" or

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[5] Although oral testimony concerning Tosti's discharge by GM was allowed into evidence, the Supreme Judicial Court affirmed the exclusion of four memoranda from GM's personnel files that reflected GM's independent investigation into Tosti's use of the repair punch.

"the Act") did not pre-empt Tosti's claim for tortious interference, but that Tosti could only recover on that claim if he proved that the Union's publication was made with "actual malice" and that it caused GM to discharge him. *Id.*, 386 Mass. at 726-729. The Supreme Judicial Court, therefore, ordered that all of Tosti's claims against the Union and against the Ayiks be tried again.

A second jury trial commenced on March 14, 1983. At the close of the plaintiff's evidence, the Union and the Ayiks moved for directed verdicts, claiming, *inter alia*, that "[t]he evidence is insufficient to warrant a finding, on clear and convincing evidence, that the Union published the article with malice, that is, knowing it to be false or with reckless disregard as to its truth or falsity." The trial judge denied the motions for directed verdicts.

On March 23, 1983, the jury returned its verdict in favor of all the defendants on Tosti's claim of tortious interference with his employment relationship. The jury also returned a verdict for Baheege Ayik on the claim of libel. However, the jury returned a verdict against Henry, the author of the allegedly defamatory article, for libelling Tosti, and assessed damages in the amount of $5,000.00. Finally, the jury returned a verdict against the Union that it was vicariously liable to Tosti for Henry Ayik's libel, and assessed damages in the amount of $495,000.00.[6] Judgments were entered by the court on the jury's verdicts on March 23, 1983.

Henry and the Union filed motions for judgment notwithstanding the verdict on March 23, 1983, contending, *inter alia*, that "[t]he evidence is insufficient to warrant a finding, on clear and convincing evidence, that the Union published the article with malice, that is, knowing it to be false or with reckless disregard as to its truth or falsity." The Union also moved on April 1, 1983 for a new trial, contending, *inter alia*, that the verdict was contrary to the evidence, which "fails to

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[6] In the course of its deliberations, the jury specifically inquired of the trial judge whether "the union [can] be held liable whether or not either defendant be liable of any charge."

establish . . . [b]y clear and convincing evidence, that the defendant, or agent or officer of the defendant published the article with actual malice, that is with knowledge of falsity or with reckless disregard of truth or falsity"; and that the "verdict of the jury in the amount of $495,000.00 against the weight of the evidence is excessive, and appears to have been influenced by passion or prejudice." The trial judge denied the motions for judgment notwithstanding the verdict and the motions for a new trial.

An appeal to the Supreme Judicial Court ensued. The Union and Henry Ayik argued on appeal that this Court's decision in *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669 (1983), which was decided after the trial of this action in 1983, compelled the conclusion that Tosti's libel claim was pre-empted by federal labor law. The Union urged that Tosti's libel claim was inextricably intertwined with his claim for intentional interference with his employment relationship with GM, and therefore, the libel claim was pre-empted under the Supreme Court's decision in *Jones*. The Supreme Judicial Court rejected the Union's argument that this Court's decision in *Jones* was controlling on Tosti's claims. *Tosti II*, 394 Mass. at 485-486.

The Union and Henry Ayik also argued on appeal that, upon an independent assessment of the record in this case, Tosti's proof was woefully deficient to establish "actual malice" with clear and convincing evidence. The Union and Henry Ayik argued that the record was devoid of any evidence that Henry published the article with knowledge that it was false or that he subjectively entertained serious doubts as to the truth of the article. The Supreme Judicial Court rejected the Union's and Henry's contention that Tosti had failed in his burden to show "actual malice" with clear and convincing evidence. *Tosti II*, 394 Mass. at 491-494. The Court held that Henry's conceded motivation to write the article in order to enforce the collective bargaining agreement's prohibition on the performance of bargaining unit work by supervisory employees would allow the jury to find "that this motive led the defendant to either fabricate the other charges or to make his accusations based on suspicions and not facts." *Id.*, 394 Mass. at 493.

However, the Supreme Judicial Court agreed with the Union's contention on appeal that the damages in the amount of $495,000.00 assessed by the jury against the Union were "clearly excessive." The Court took cognizance of the fact that the jury's question to the trial judge on whether they could find the Union liable for defamation whether or not any Union official committed any wrongful act against the plaintiff "impermissibly reflected prejudicial or punitive considerations." *Id.*, 394 Mass. at 495-499.[7] The Court, therefore, reversed the judgment against the Union. It remanded the case for a new trial solely on the issue of damages, if, after the trial court ordered a remittitur, the plaintiff refused to accept the damages as remitted. *Id.*, 394 Mass. at 499. The award against Henry Ayik was affirmed by the Supreme Judicial Court. *Id.*, 394 Mass. at 501.[8]

On remand, the trial court appointed the former trial judge who had presided at the 1983 trial to act as a special master to make a recommendation as to the amount of the jury's assessment of damages that was excessive. The special master presented a Memorandum in Support of Recommended Remittitur to the trial court. The Union presented a detailed opposition to the special master's recommendation, but to no avail. The trial court, on the basis of the special master's recommendation, remitted the damage award against the Union from $495,000.00 to $275,000.00. *See* Appendix G, pp. 40a-45a.

A third appeal to the Supreme Judicial Court ensued. The Union, echoing its opposition to the special master's recommended remittitur, argued on appeal that the damages as remitted remained clearly excessive in view of the *de minimis* evidence offered by the plaintiff as proof of his injury. The Union argued that no evidence was presented as to the value of employment benefits allegedly lost by the plaintiff and therefore

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[7] The fact that the jury assessed damages of only $5,000.00 against Henry Ayik, the author of the purported libel, was also indicative of the jury's animus toward unions. The award of only $5,000.00 against Henry provides a stark comparison to the jury's $495,000.00 award against the Union, which was liable only vicariously for Henry's conduct.

[8] The statement in *Tosti III*, 400 Mass. at 225 n.2, that there was no appeal from the judgment against Henry Ayik is in error.

no competent evidence existed to make such an award of special damages. The Union also argued that the *only* evidence of general damages on account of injury to reputation or mental suffering was that, on the day of his discharge, Tosti was shaken up and lay down when he returned home, which was very unusual for him to do. No evidence was presented that the plaintiff received any medical or psychiatric treatment as a result of the Union's publication. In *Tosti II*, 394 Mass. at 498, the Supreme Judicial Court expressly agreed that the evidence the plaintiff chose to present of harm to his reputation and mental suffering was "sparse indeed." Yet, in *Tosti III*, 400 Mass. 224, the Supreme Judicial Court appeared to have a change of heart and affirmed the libel award against the Union of $275,000.00, with interest in the amount of $428,187.17.

Recognizing that the very existence of the Union was jeopardized by the magnitude of the libel award and that the Union has presented issues that are sufficiently compelling for the Supreme Court to grant its Writ of Certiorari, the Supreme Judicial Court allowed the Union's motion for a stay of enforcement of the judgment pending the filing and disposition of its Petition for a Writ of Certiorari. *See* Appendix F, pp. 38a-39a. With its continued operation temporarily assured by the Supreme Judicial Court's stay of enforcement of the judgment, the Union now respectfully petitions this Honorable Court to issue its Writ of Certiorari to review the final judgment of the Supreme Judicial Court in this matter.

## Argument.

### I. The Plaintiff's State Law Defamation Claim is Pre-Empted by the National Labor Relations Act Because State Court Jurisdiction Over That Claim Poses An Obvious and Substantial Risk of Interference With the Jurisdiction of the National Labor Relations Board.

#### A. *The Supreme Judicial Court Committed Reversible Error When It Ruled That This Action Was Not Pre-empted Solely Because It Involved A Defamation Claim.*

This case presents the Court with the question of whether a particular state cause of action "may coexist with the comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in the NLRA to govern labor-management relations affecting interstate commerce." *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669, 675-676 (1983). Specifically, the issue presented is whether an action for defamation is pre-empted where, unlike the facts of *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), essential elements of both the plaintiff's state law claim and an arguable unfair labor practice arising from the same conduct are "the same in a fundamental respect." *Jones*, 460 U.S. at 682.

The broad pre-emptive scope of the NLRA was spelled out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), where the Court held that when the activities sought to be regulated by a state are clearly or may fairly be assumed to be within the purview of Sections 7 or 8 of the Act, "due regard for the federal enactment requires that state jurisdiction must yield." *Id.*, 359 U.S. at 244. However, the Court did not stop at this point in defining the boundaries of the pre-emption doctrine. Rather, the Court fashioned an even broader rule of pre-emption to ensure that state laws do not interfere with federal regulation of labor relations:

> When an activity is *arguably* subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

*Id.*, 359 U.S. at 245 (emphasis supplied).

The Court in *Garmon* recognized that in extremely limited circumstances it may be appropriate to allow state courts to exercise jurisdiction over certain conduct which otherwise would fall within the purview of the NLRA. Thus, where the conduct at issue is only of "peripheral concern" to the Act or touches on interests deeply rooted in local feeling and responsibility, the Court will balance the state's interest against the risk of interference with the exclusive jurisdiction of the National Labor Relations Board ("NLRB" or "the Board") to adjudicate controversies committed to it by the Act. *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 498-499 (1983); *Garmon*, 359 U.S. at 243-244.

In the nearly thirty years since *Garmon*, the Court frequently has had the opportunity to clarify the circumstances under which state courts may exercise jurisdiction over conduct arguably protected or arguably prohibited by the NLRA. In *Linn*, 383 U.S. 53, a management employee brought a claim in state court alleging that he had been defamed by statements made by a union during an organizing campaign. The Court was required to decide whether, under the principles laid down in *Garmon*, the NLRA pre-empted the state cause of action. In its decision, the Court ruled that even in the context of a labor dispute, defamatory statements made with "actual malice" are not protected under Section 7 of the NLRA, and therefore pre-emption is not required when that standard of proof is satisfied.[9]

The court in *Linn* also considered the pre-emption issue under the "arguably prohibited" branch of the *Garmon* doc-

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[9] The Court adopted the definition of "actual malice" set forth in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *See* discussion at 19-20, *infra*.

trine. In so doing, the Court acknowledged that the allegedly defamatory statements by the union arguably violated Section 8(b)(1)(A) of the Act.[10] Accordingly, the Court had to decide whether the cause of action, even if premised on conduct arguably prohibited by the NLRA, was of merely peripheral concern to the Act. Utilizing an analysis since refined in subsequent opinions, the Court looked to the issues that would have to be decided in each forum. The Court observed that, in evaluating a claim under Section 8(b)(1)(A), the Board would be concerned solely with the coercive and misleading effect of the union's statements on employees deciding how to vote in an election. By contrast, the sole focus of the state court decision would be on the defamatory nature of the statements and their effect on the reputation of the company official, issues "of no relevance to the Board's function." *Linn*, 383 U.S. at 63.

In reaching its holding that pre-emption was thus not mandated, the Court also emphasized that the NLRB would be unable to award damages or give any other relief to the defamed management official. Rather, the NLRB would be limited to redressing the injury to employees by the union's statements through the setting aside of an election. The Court therefore concluded that the "Board's lack of concern for the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption." *Id.*, 383 U.S. at 64.[11]

Seventeen years after *Linn*, the Court decided *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669. In *Jones*, the plaintiff was discharged from his employment as a supervisor, allegedly as a result of union

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[10] Section 8(b) provides in part that "[i]t shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [Section 7 of the NLRA] . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . ." 29 U.S.C. § 158(b)(1).

[11] Subsequent cases have acknowledged the unavailability of a Board remedy for the aggrieved individual as an important element in the Court's holding in *Linn*. *See Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 271 (1974); *Farmer* v. *United Brotherhood of Carpenters and Joiners, Local 25*, 430 U.S. 290, 298 (1977).

pressure. The plaintiff filed an unfair labor practice charge with the Board, alleging violations of Section 8(b)(1)(A) and (B) of the Act. After the Regional Director dismissed the charges, the plaintiff proceeded to state court and brought an action against the union for intentional interference with contractual relations. The state court rejected the Union's claim that Jones' cause of action was pre-empted by the NLRA.

In reversing that decision, the Court clarified the scope of the pre-emption test where the conduct sought to be regulated by the state is "arguably prohibited" under the Act. Relying on its earlier decision in *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters,* 436 U.S. 180 (1978), the Court stated that "'the critical inquiry'" is "'whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board.'" *Jones,* 460 U.S. at 681 (quoting *Sears,* 436 U.S. at 197).[12] The plaintiff argued that the claims were not identical because a Section 8(b)(1)(B) violation requires union coercion, whereas the state law allegedly reached noncoercive interference with contractual relationships. Rejecting that argument, the Court pointed out that in either instance a fundamental element of both the unfair labor practice charge and the state claim is that the union's actions actually caused the discharge. Consequently, both the federal and state claims were "the same in a fundamental respect,"[13] and the risk of interference with the Board's jurisdiction was therefore "obvious and substantial." *Jones,* 460 U.S. at 682-683. Thus, the Court confirmed that the test for pre-emption utilized in *Linn* and clarified in *Sears* does not require complete

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[12] *Sears* involved a state trespass claim brought against a union by an employer whose establishment was being picketed. Although the picketing arguably violated the Act, the Court held that the state cause of action was not identical to any claim under the Board's jurisdiction. While the Board would focus on the objective for the picketing, the state court would be concerned only with its location. Thus, there was no issue to be decided by the state court that was central to the Board's resolution of any unfair labor practice charge.

[13] The Court in a footnote distinguished *Linn,* but did not suggest that under *Linn* a state defamation suit would be allowed even where, as here, the federal and state claims are "the same in a fundamental respect." *Jones,* 460 U.S. at 681 n.11.

congruity between the state cause of action and an arguable unfair labor practice. Rather, where adjudication of the state claim requires the court to resolve an issue at the core of the unfair labor practice claim, pre-emption is necessary to protect the jurisdiction of the Board.[14]

In *Tosti II*, the Supreme Judicial Court held that the instant case is governed directly by *Linn*. In so doing, it rejected the Union's argument that *Linn* is distinguishable, and that the instant case is more appropriately analyzed under this Court's decision in *Jones*. The Union contends that the ruling in *Tosti II* was error, and that under the *Garmon* doctrine, as clarified in subsequent Supreme Court decisions, Tosti's defamation action is pre-empted by the NLRA.

The Union concedes that *Linn* would allow the state defamation action herein to proceed when one considers only the "arguably protected" branch of analysis.[15] But *Linn* should not be read as holding, as *Tosti II* implies, that a cause of action under state law for defamation can never be pre-empted when a plaintiff is able to prove actual malice. Rather, adoption of the actual malice standard was designed solely to establish the outer limit of *protected* conduct under Section 7 of the Act.

What the Union maintains is that under the "arguably *prohibited*" part of the pre-emption analysis, the facts of this case are significantly distinct from those addressed by the Court in *Linn*. Indeed, the facts of the instant case more closely resemble those presented in *Jones*, where the Court found the state tort claim to be pre-empted. Specifically, the decision in *Linn* regarding the pre-emptive effect of arguably prohibited conduct differs in two fundamental ways from the instant case.

First, the Court in *Linn* observed that in order to entertain the defamation claim, the state court would not be required to resolve issues central to the determination of a Section 8(b)(1)(A)

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[14] This interpretation of the holding in *Jones* has been acknowledged by at least one federal court of appeals. *See Lumber Production Industrial Workers, Local #1054* v. *West Coast Industrial Relations Association, Inc.*, 775 F.2d 1042, 1048-1049 (9th Cir. 1985).

[15] The Union *is* challenging, however, the Supreme Judicial Court's holding that the actual malice standard adopted in *Linn* was satisfied by Tosti. *See* discussion at 18-23, *infra*.

violation. Consequently, state court jurisdiction posed little risk of interference with the Board's exclusive jurisdiction to regulate conduct prohibited by Section 8 of the NLRA. By contrast, in the instant case, a central element of the plaintiff's defamation claim was that the Union had caused his discharge. As the Court observed in *Jones*, such a claim arguably constitutes a violation of Section 8(b)(1)(B). *Jones*, 460 U.S. at 680.[16] Thus, both Tosti's claim that the Union had caused his discharge and any claim under Section 8(b)(1)(B) are "the same in a fundamental respect," and litigation of that issue in state court creates an "obvious and substantial" risk of interference with the Board's jurisdiction. *Jones*, 460 U.S. at 682-683.

Second, *Tosti* does not present a situation where "[t]he Board can award no damages, impose no penalty, or give any other relief to the defamed individual." *Linn*, 383 U.S. at 63. To the contrary, the Board is empowered in a Section 8(b)(1)(B) case to remedy the loss of income and fringe benefits attributable to Tosti's discharge through a back pay award. *Silver Bay Local Union No. 962, International Brotherhood of Pulp, Sulphite and Paper Workers*, 215 NLRB 414 (1974), *enforced*, 510 F.2d 1364 (9th Cir. 1975). *See also* NLRB Casehandling Manual §§ 10550 *et seq*. This factor further distinguishes the instant case from *Linn*, where the Court emphasized that the depth of the state's interest in that case was attributable in large measure to the lack of a federal remedy. *Linn*, 383 U.S. at 64 n.6.[17]

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[16] To establish pre-emption, it also is necessary under the Court's recent decision in *International Longshoremen's Association* v. *Davis*, 476 U.S. 380 (1986) to show that Tosti arguably was a Section 8(b)(1)(B) employer-representative. The record reflects that Tosti held the position of foreman. Trial testimony and the collective bargaining agreement further reflect that individuals holding that position were directly involved in grievance-adjustment activities. This evidence is more than sufficient to establish that Tosti arguably was an employer-representative under Section 8(b)(1)(B). Cf. *NLRB* v. *International Brotherhood of Electrical Workers, Local 340*, U.S. , 107 S.Ct. 2002 (1987).

[17] The Union acknowledges that a back pay award would not provide Tosti with the full relief recoverable in state court, such as damages for personal humiliation and mental anguish. Nonetheless, the Court has "squarely rejected" the argument that state court jurisdiction must be allowed simply because additional or different relief may be available in the state forum. *Jones*, 460 U.S. at 684; *Garmon*, 359 U.S. at 246-247.

The Court has warned that the *Garmon* pre-emption doctrine must not be applied "in a literal, mechanical fashion." *Sears*, 436 U.S. at 188. This admonition must hold true for the exceptions as well as for the general rule. Therefore, the result in this case should not be dictated merely by the fact that Tosti's claim was for defamation rather than interference with contractual relations. Congress surely did not intend for the pre-emptive effect of the federal labor laws to hinge on the label affixed to a particular cause of action.

What is central to deciding the pre-emption issue is whether, in adjudicating and awarding damages in the state court action, that court would by necessity decide issues central to the resolution of an unfair labor practice. Here, as in *Jones*, the state court was indeed required to decide whether the Union's conduct caused Tosti's discharge, precisely the issue "at the core of § 8(b)(1)(B) cases." *Jones*, 460 U.S. at 683. Thus, Tosti's claim is not merely of "peripheral concern" to the effective and uniform implementation of the Act. Although the Court in *Linn* found the state's interest in protecting its citizens' reputations to be "deeply rooted," this alone is insufficient to justify interference with the Board's jurisdiction where it is empowered to remedy the single most significant loss he allegedly suffered — the loss of his job. Consequently, the arguments for pre-emption in the instant case have not been "vitiate[d]", as they were in *Linn*.

B. *Even If Not Pre-empted In Its Entirety, The Plaintiff's Claim Should Be Partially Pre-empted In Order To Avoid An Obvious And Substantial Risk Of Interference With The Jurisdiction Of The NLRB.*

Even if the Court were to conclude that Tosti's defamation claim is not pre-empted in its entirety, that claim should be foreclosed at least to the extent that Tosti attempts to recover damages for termination of his employment resulting from the Union's conduct. Indeed, permitting the defamation action in this case to go forward but at the same time limiting the damages awardable by the state court would be consistent with the Court's holding in *Farmer* v. *United Brotherhood of Carpenters and Joiners, Local 25*, 430 U.S. 290 (1977). There,

the Court ruled that an individual could maintain a state claim against his union for intentional infliction of emotional distress. Nonetheless, to the extent that damages were attributable to discrimination in hiring hall referrals, which violates the NLRA, as opposed to the abusive manner of the union's actions, damages could not be awarded because to do so would interfere with the Board's exclusive jurisdiction.

The instant case presents an equally compelling argument for limiting the type of damages to those not available from the NLRB. Such a result also avoids interference with the Board's jurisdiction while allowing the state to remedy harm to its' citizens' reputations. As discussed above, had Tosti filed a charge alleging a violation of Section 8(b)(1)(B), the Board would have had to decide the "core issue" of whether the Union, by its actions, had coerced GM into discharging Tosti. Were a violation of the NLRA to be found, the Board would be empowered to remedy the loss of Tosti's job by awarding him back pay, including certain fringe benefits such as pension contributions and insurance benefits as well as lost wages. By contrast, the Board would not be concerned with other aspects of any injury to Tosti's reputation, which could be remedied through a state defamation suit. At the same time, by foreclosure of damages for loss of income, the state court would not have to address the core issue of a Section 8(b)(1)(B) case — whether the Union was responsible for Tosti's discharge.

Foreclosing recovery for loss of income while permitting other types of damages also poses no administrative obstacles. Indeed, in *Tosti III*, the Supreme Judicial Court acknowledged the clear distinction between an award of back pay and other relief designed to compensate an individual for personal humiliation and anguish resulting from injury to his reputation. In sum, by limiting the relief available in state court, as this Court did in *Farmer*, the state can enforce its acknowledged interest in protecting its' citizens' reputations without a substantial risk of interference with the federal regulatory scheme governing labor relations.

In conclusion, the principles spelled out in *Garmon* and refined in subsequent decisions — including *Linn* — require

that state jurisdiction over the instant case be pre-empted in view of the substantial risk of interference with the federal regulatory scheme and the availability in this instance of a personal remedy from the Board. Alternatively, even if a balancing of the federal and state interests leads to the conclusion that this action is not pre-empted in its entirety, the Court should excise, as it did in *Farmer*, those elements of the action which are at the core of a claim subject to Board jurisdiction.

## II. The Plaintiff's Evidence Was Insufficient As a Matter of Law to Establish with Clear and Convincing Clarity That the Union Official Knew That the Statement Concerning the Plaintiff Was False, or That the Union Official Acted with Reckless Disregard of Whether His Statement Was False or Not, and Contrary to the Supreme Judicial Court's Holding, the Motivation to Enforce a Collective Bargaining Agreement Cannot Give Rise to an Inference of "Actual Malice."

In *Linn*, the Supreme Court manifested its concern that debate in the context of labor disputes be allowed to flourish free of the spectre of state court defamation actions. The Court recognized that the NLRA encourages uninhibited, robust, and wide-open debate:

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, [labor disputes] are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.

*Id.*, 383 U.S. at 58. In order to safeguard "against abuse of libel actions and unwarranted intrusion upon free discussion

envisioned by the Act," the Court held that federal labor law pre-empts state libel law to the extent that defamatory statements made in the context of a labor dispute are actionable only if the statements were made with "actual malice," as that term has come to be understood through *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) and its progeny. *Linn*, 383 U.S. at 61, 65. Thus, a person who claims that he has been defamed in a labor dispute cannot recover unless he pleads and proves that the false statement was made with knowledge of falsity or reckless disregard of whether the statement was true or false.

The Supreme Judicial Court properly acknowledged that the article published in the Union newspaper concerned a controversy over supervisory personnel doing bargaining unit work in violation of the collective bargaining agreement and, as such, was a statement made in the context of a labor dispute and entitled to the protection of *Linn*. *Tosti I*, 386 Mass. at 724. As this Court has noted, "whether *Linn's* partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a 'labor dispute'; rather, application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." *Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 279 (1974). Therefore, the Supreme Judicial Court held that the trial court's failure to instruct on "actual malice" at the first trial of this action compelled a new trial under instructions mandated by this Court's opinion in *Linn*. *Tosti I*, 386 Mass. at 725.

In cases governed by the principles of the *New York Times* case, the plaintiff bears the burden of proving "actual malice" with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement. *New York Times*, 376 U.S. at 280; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984). The test to determine

whether a statement was published with "reckless disregard" of its truth or falsity has been variously described by the Supreme Court as "subjective awareness of probable falsity" (*Gertz*, 418 U.S. at 335 n.6); a "high degree of awareness of . . . probable falsity" (*Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 84 (1967) (per curiam)); and "awareness of probable falsity" (*Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153 (1967)). Indeed, the Court has made it plain that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Herbert* v. *Lando*, 441 U.S. 153, 156 (1979). Where a statement concerns the reporting of an ambiguous situation, the breathing space necessary for the very survival of the First Amendent does not allow a finding of "actual malice" to be based on no more than a defendant's "error of judgment." *Time, Inc.* v. *Pape*, 401 U.S. 279, 292 (1971). Courts that have properly applied the Supreme Court's test have recognized "'the almost decisive amplitude of "breathing space" surrounding defamatory falsehood, once a plaintiff is obliged to meet the *New York Times* standard.'" *Bose Corp.* v. *Consumers Union of United States, Inc.*, 692 F.2d 189, 195 (1st Cir. 1982) (quoting *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 586 (1st Cir. 1980)), *aff'd*, 466 U.S. 485 (1984).

The Supreme Judicial Court realized that because this defamation action was governed by the *New York Times* standard, the Court was under an obligation to determine whether the jury would be warranted in concluding that "actual malice" was shown by clear and convincing evidence. *Tosti II*, 394 Mass. at 491. The Supreme Court has made it abundantly clear that appellate courts must independently assess those portions of the record which relate to the "actual malice" determination. *Bose Corp.*, 466 U.S. at 514 n.31. *See also id.*, 466 U.S. at 519 n.2 (Rehnquist, J., dissenting, joined by O'Connor, J.) (defamation actions from state courts after a jury trial are "the strongest case for independent factfinding by this Court").

"Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.*, 466 U.S. at 511.

The Union respectfully submits that the record is barren of any independent evidence that Henry Ayik "realized the inaccuracy of the statement, or entertained serious doubts as to its truthfulness, at the time of the publication." *Id.*, 466 U.S. at 498. Rather, the evidence submitted by the plaintiff to the jury at most constituted proof of falsity, and mere proof of falsity is, as a matter of law, insufficient to prove "actual malice." *Id.*, 466 U.S. at 511. Therefore, the Union requests that this Court issue its Writ of Certiorari to determine whether the plaintiff sustained his burden of proving "actual malice" with clear and convincing evidence.

The Supreme Judicial Court held in *Tosti II*, 394 Mass. at 491-494, that Tosti had presented sufficient evidence to show with clear and convincing proof that Henry Ayik knew that his article was false or subjectively entertained serious doubts about the truth of his statement. An independent assessment of the portions of the record which relate to the "actual malice" determination will, the Union submits, clearly indicate that the plaintiff's evidence was fatally deficient to show that Henry Ayik knowingly published a false description of what he believed he had observed, or subjectively entertained serious doubts about what he believed he had observed on June 7, 1971.

The very heart of the Supreme Judicial Court's holding on "actual malice" is that Henry Ayik's conceded motivation to write the article in an attempt to enforce the collective bargaining agreement's prohibition on supervisory employees performing bargaining unit work allows an inference that Henry knowingly fabricated the article or published it with subjective doubts as to its truth. *Tosti II*, 394 Mass. at 493. The Supreme Judicial Court concluded that the "jury could therefore have found that this motive led the defendant to either fabricate the other charges or to make accusations based on suspicions and not facts." *Id.* The Court went on to say that this conclusion

would have been particularly warranted if the jury had found that Henry could not have observed Tosti during the months of April and May because Henry and Tosti were, according to Tosti, on different shifts. *Id.*

The Supreme Judicial Court's ruling on "actual malice" would turn this Court's opinions in *Linn* and *Old Dominion* on their heads. The fact that this labor dispute concerned an effort to enforce the collective bargaining agreement between the Union and GM was the very reason that the Supreme Judicial Court in *Tosti I*, 386 Mass. 721, had held that Tosti could not recover in his libel action unless he showed that the allegedly defamatory publication was made with "actual malice." The carefully crafted protections accorded to debate in the labor context by the NLRA and by this Court's opinions in *Linn* and *Old Dominion* are simply set at naught by the Supreme Judicial Court's decision in *Tosti II*, 394 Mass. at 493. A jury cannot be allowed to infer knowledge of falsity or reckless disregard for the truth from the mere fact that a defendant was motivated to publish a Union newspaper article to enforce the collective bargaining agreement's prohibition on supervisory employees doing bargaining unit work. If the Supreme Judicial Court's ruling is allowed to stand, the very shield of protection afforded by the imposition of the "actual malice" standard in the context of a labor dispute would become a sword in the hand of defamation plaintiffs asking a jury to infer "actual malice" by the mere motivation to enforce the collective bargaining agreement. As well might a "public official" or a "public figure" argue that "actual malice" should be inferred by the motivation of a newspaper reporter to criticize a public official's or a public figure's conduct. *See, e.g., New York Times*, 376 U.S. 254; *Gertz*, 466 U.S. 323. If the very reason for requiring a plaintiff to meet the "actual malice" standard allows an inference that the standard has been satisfied in the particular case at hand, the protections afforded to debate in the labor context by *Linn*, *Old Dominion*, and the NLRA are chimerical indeed.[18]

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[18] *See Farmer*, 430 U.S. at 305 ("Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the

The Supreme Judicial Court clearly erred in holding that Henry Ayik's motivation to write an article concerning the performance of bargaining unit work by a supervisor warranted an inference by the jury that that motivation led Henry to fabricate his story or to base his conclusions on suspicions instead of facts.[19] The Union respectfully urges this Court to issue its Writ of Certiorari to review the final judgment of the Supreme Judicial Court in order to restore vitality to the Court's holdings in *Linn* and *Old Dominion*.

III. A DAMAGE AWARD OF $275,000.00 (WITH INTEREST IN THE AMOUNT OF $428,187.17) IN THIS DEFAMATION ACTION IS CLEARLY EXCESSIVE AND UNSUPPORTED BY COMPETENT EVIDENCE IN THE RECORD WHERE (1) NO EVIDENCE OF THE VALUE OF THE PLAINTIFF'S ALLEGEDLY LOST EMPLOYMENT BENEFITS WAS PRESENTED BY THE PLAINTIFF; (2) THE SUPREME JUDICIAL COURT CHARACTERIZED THE PLAINTIFF'S EVIDENCE OF HARM TO REPUTATION AND MENTAL SUFFERING AS "SPARSE INDEED"; (3) THE JURY RETURNED A VERDICT OF ONLY $5,000.00 AGAINST THE AUTHOR OF THE ALLEGED LIBEL FOR WHICH THE UNION WAS ONLY LIABLE VICARIOUSLY; AND (4) THE JURY WAS CLEARLY MOTIVATED BY ANIMUS TOWARD UNIONS BECAUSE IT WAS PREPARED TO HOLD THE UNION LIABLE REGARDLESS OF WHETHER ANY UNION OFFICIAL HAD COMMITTED ANY WRONG AGAINST THE PLAINTIFF.

This Court has emphasized that "in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers." *Linn*, 383 U.S. at 64.

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pre-emption principle."). Here, too, a motivation to enforce the collective bargaining agreement cannot itself form the underlying "actual malice" on which the state defamation action is allowed to proceed. To hold as the Supreme Judicial Court did is to undermine the pre-emption principle of *Linn*.

[19] This holding is particularly inappropriate given that GM's independent investigation of Tosti's activities with a repair punch led GM to the same conclusion that Henry Ayik had reached on June 7, 1971; namely, that Tosti was punching repair tickets without performing repairs.

The Court has held that "'[i]f the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial.'" *Old Dominion*, 418 U.S. at 287 n.17 (quoting *Linn*, 383 U.S. at 65-66).[20]

In recognition of the Supreme Court's precedents, the Supreme Judicial Court has held that "'[b]ecause of constitutional considerations, and the potential difficulties in assessing fair compensation . . . both trial and appellate judges have a special duty of vigilance in charging juries and reviewing verdicts to see that damages are no more than compensatory.'" *Tosti II*, 394 Mass. at 495 (quoting *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 861, 330 N.E.2d 161, 170 (1975)). Therefore, after reviewing the evidence the plaintiff submitted as proof of his damages, the Supreme Judicial Court held in *Tosti II*, 394 Mass. at 499 that "the jury's award of $495,000 against the Union was clearly excessive and impermissibly reflected prejudicial or punitive considerations." The Court took special note that the jury had inquired of the trial judge during its deliberations whether it could find the Union liable without finding that any of the defendant Union officials had committed any wrong against the plaintiff. *Id.*, 394 Mass. at 499 n.11. In its opinion, the Supreme Judicial Court held that it was unable to competently estimate the amount of the plaintiff's allegedly lost employment benefits "on the basis of the record presented." *Id.*, 394 Mass. at 497 n.10. In addition, the court characterized the plaintiff's evidence of harm to reputation and mental suffering as "sparse indeed," gleaning from the record only the plaintiff's wife's testimony that "the plaintiff was 'shook up' on the day of his discharge and lay down when he returned home which was very unusual for him to do. There was no suggestion that the plaintiff received any medical or psychiatric treatment as a result of the libel." *Id.*, 394 Mass. at 498-499.

Despite these clear and unequivocal holdings in the Supreme Judicial Court's opinion in *Tosti II*, the trial court, on remand,

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[20] Of course, if any libel award on the basis of the Union publication would be inconsistent with the requirements of federal labor law, the Court need not reach the Union's alternative argument that the damages awarded to Tosti were excessive. *Old Dominion*, 418 U.S. at 287 n.17.

adopted the special master's suggested remittitur of the damages from $495,000.00 to $275,000.00. *See* Appendix G, pp. 40a-45a. In certain fundamental respects, the special master's recommendation of remittitur did not fulfill the trial court's special duty of vigilance to ensure that the damage award was not excessive, but rather, based on competent evidence of actual injury in the record.

The special master believed that his recommended remittitur was supported by the fact that "two juries returned verdicts against the defendants in excess of $400,000." Appendix G, p. 44a. The Union argued to the trial court and to the Supreme Judicial Court that reliance on the first jury verdict that was based on jury instructions that did not include an instruction on "actual malice" as required by the Supreme Judicial Court's opinion in *Linn* was manifestly inappropriate. *Tosti I*, 386 Mass. 721. The Union also argued that reliance on the jury's verdict of $495,000.00 that was held to be clearly excessive and reflective of prejudicial and punitive considerations in *Tosti II*, 394 Mass. 482, was also improper, especially since the jury awarded only $5,000.00 in damages against the author of the alleged libel for which the Union was only vicariously liable. That the jury's negative attitude toward the labor movement entered into its consideration need not be surmised in this action merely because of the gross discrepancy between the jury awards against Henry Ayik and against the Union. The jury's animus toward unions was palpable in its questions to the trial judge on whether they could hold the Union responsible for the defamation even if all of the Union officials were exonerated of any liability. Rather than eliminating the improper effect of negative attitudes toward unionization in examining the jury's award, the special master and the trial court embraced the jury's award. By failing to address these arguments on appeal, the Supreme Judicial Court in *Tosti III*, 400 Mass. 224, the Union believes, failed to exercise that special duty of vigilance that is the labor movement's last refuge against jury awards that are actuated more by animus toward unions than by competent evidence of actual injury presented by the plantiff.

In another respect, the damages as remitted by the trial court remain clearly excessive. The special master held that even though Tosti had presented *no evidence* of the value of employment benefits which he allegedly lost as a result of GM's termination of his employment, he considered the plaintiff's alleged loss of employment benefits in making his recommendation on remand. Appendix G, p. 43a. Under Massachusetts law, it has been clear that "special damages," such as lost employment benefits, must be pleaded and *proved* in order to recover for their loss in a defamation action. *Stone*, 367 Mass. at 860, 330 N.E.2d at 169; *Muchnick* v. *Post Publishing Co.*, 332 Mass. 304, 125 N.E.2d 137 (1955); *Lewis* v. *Vallis*, 356 Mass. 662, 255 N.E.2d 337 (1970); *Craig* v. *Proctor*, 229 Mass. 339, 118 N.E. 647 (1918). Thus, in *Tosti II*, 394 Mass. at 497 n.10, the Supreme Judicial Court had held that no award for loss of the plaintiff's employment benefits could be made on this record because there was no competent evidence presented by Tosti from which the Court could ascertain or even competently estimate the value of such benefits that Tosti allegedly lost. Nonetheless, in *Tosti III*, 400 Mass. at 228, the Supreme Judicial Court affirmed the judgment even though it recognized that "there was no evidence of [the] monetary value" of plaintiff's lost benefits "such as hospital, medical and life insurance, and pension rights." An award of damages for such allegedly lost benefits is a clear departure from Massachusetts precedent. Moreover, it is contrary to this Court's opinion in *Linn*, 383 U.S. at 65, that "a complainant may not recover except upon proof of harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that the rule be followed." *See also Farmer*, 430 U.S. at 299. Therefore, by allowing Tosti to recover, in an unspecified amount, for allegedly lost employment benefits for which he presented no evidence of pecuniary value, the Supreme Judicial Court departed from the Supreme Court's admonition in *Linn* that a

defamation plaintiff cannot recover for specific items of pecuniary loss without proof of such resulting harm.[21]

Finally, the special master recommended a very substantial award for general damages for harm to reputation and mental suffering. Appendix G, pp. 44a. The Supreme Judicial Court in *Tosti II*, 394 Mass. at 498-499, held that the evidence Tosti presented of harm to reputation and mental suffering was "sparse indeed." The Court noted that "[t]he record contains testimony by the plaintiff's wife that the plaintiff was 'shook up' on the day of his discharge and lay down when he returned home, which was very unusual for him to do. There was no suggestion that the plaintiff received any medical or psychiatric treatment as a result of the libel." In *Tosti III*, 400 Mass. at 229, the Court acknowledged its former characterization of the evidence of harm to reputation and mental suffering as "sparse indeed," but states that the plaintiff did submit evidence that he had to sell his two homes and furniture, to relocate seven times to rental properties, and to borrow money from relatives as a result of his termination from GM. However, these alleged consequences of the defamation arise solely from the plaintiff's alleged loss of income that he would have earned but for GM's decision to terminate his employment. No evidence was presented by the plaintiff that his reputation was damaged in the eyes of even a single individual, and the evidence of mental suffering that was unrelated to the loss of income was limited to Tosti's wife's testimony that he was shaken up on the day of his discharge and lay down upon his return home. Such sparse evidence is, most assuredly, woefully insufficient to support a very substantial damage award.

In sum, the Union respectfully urges that the Court issue its Writ of Certiorari to the Supreme Judicial Court to review the $275,000.00 libel award against the Union in this action that the Union claims is clearly excessive based on the evidence that the plaintiff submitted to the trial court.

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[21] The special master awarded $100,000.00 to the plaintiff for lost income, and $175,000.00 for lost employment benefits and general damages for harm to reputation and mental suffering. The special master did not allocate the $175,000.00 between the latter two categories of damages.

**Conclusion.**

For the foregoing reasons, it is respectfully requested that this Honorable Court issue its Writ of Certiorari to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Respectfully submitted,

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## Appendix.

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# AUGUSTINO TOSTI *vs.* HENRY AYIK & another.[1]

Middlesex. December 5, 1986. — June 10, 1987.

Present: HENNESSEY, C.J., WILKINS, ABRAMS, & O'CONNOR, JJ.

*Libel and Slander. Damages,* Libel, Remittitur, Back pay, Mitigation, Emotional distress.

A plaintiff whose employment had been terminated as the result of the publication of libelous statements concerning him in a union newspaper was required to make a good faith effort to mitigate his damages by seeking comparable employment, but once that effort was made, he was entitled to be compensated in an amount that reflected what he would have earned had his employment not been terminated. [227-228]

In an action arising from the publication of alleged libelous statements in a union newspaper concerning the plaintiff, a foreman in an automobile manufacturing plant whose employment had been terminated as a result of the statements, an award of $703,187.17, including interest, against the union was not clearly excessive where adequate evidence warranted

[1] United Auto Workers, Local 422. When this action was originally commenced by the plaintiff, an unincorporated voluntary association such as a labor union could not be sued in its own right. *Tosti* v. *Ayik*, 394 Mass. 482, 484 n.4 (1985) (*Tosti II*), citing *Members of Bakery & Confectionery Workers Int'l Union, Local 458* v. *Hall Baking Co.*, 320 Mass. 286 (1946). Consequently, the action was brought against several representative officers and members of the union, as well as two members as individuals. *Tosti II*, *supra* at 484. Before the retrial of this action mandated by *Tosti* v. *Ayik*, 386 Mass. 721 (1982) (*Tosti I*), however, we altered this rule and held that unions will be considered "legal entities for the purpose of suing or being sued." *DiLuzio* v. *United Elec., Radio & Mach. Workers, Local 274*, 386 Mass. 314, 314 (1982). Nonetheless, both after retrial and after plaintiff's acceptance of the remittitur, judgment entered against "Members of Local 422, United Auto Workers." A review of the record makes clear the trial judge during retrial applied *DiLuzio*, recognizing that plaintiff's claims were being asserted against the union, and not against members of the union. Similarly, our treatment of the issue in *Tosti II*, *supra* at 482 n.1, 484 n.4, also indicates that the union itself is the appropriate defendant. Accordingly, we treat this as an action against Local 422 of the United Auto Workers. In light of the disposition of this case, the judgment entered against the members of Local 422 of the United Auto Workers should be vacated, and an appropriate judgment against the union local itself should be entered.

a master's conclusions as to the consequences to the plaintiff from his termination and where, in concluding that "the quality and standard of plaintiff's life was substantially affected by defendant's conduct," the master properly took into account that the "plaintiff lost his job, the benefits incident thereto, was forced to sell his home, and was unable to find comparable work." [228-229]

TORT. Writ in the Superior Court dated August 6, 1973.

Following review by the Supreme Judicial Court reported in 394 Mass. 482 (1985), a remittitur was ordered by *Thomas R. Morse, Jr.*, J.

The Supreme Judicial Court granted a request for direct appellate review.

*Gary R. Greenberg* (*Louis J. Scerra, Jr.*, with him) for United Auto Workers, Local 422.

*John J. C. Herlihy* (*Karen M. Thursby* with him) for the plaintiff.

O'CONNOR, J. The plaintiff, previously a foreman of General Motors Corporation (G.M.) in Framingham, commenced this action in 1973 to recover for libel and tortious interference with his employment relationship with G.M. The action arose out of an article in the defendant union's newspaper written by the defendant Henry Ayik. The article accused the plaintiff of engaging in union work in violation of the union's contract with G.M., and punching vehicle repair tickets indicating that work had been done although it had not been done. The plaintiff alleges that the article caused G.M. to fire him. The jury returned verdicts against Henry Ayik, Baheege Ayik, and the union. The defendants appealed, and this court reversed the judgments and ordered a new trial. *Tosti* v. *Ayik*, 386 Mass. 721 (1982) (*Tosti I*).

On retrial, the jury found for all the defendants on the plaintiff's claim of tortious interference with his employment relationship, and they found for the defendant Baheege Ayik on the libel claim. However, they found for the plaintiff against Henry Ayik in the sum of $5,000[2] and against the union in the

[2] Judgment was entered on that verdict. There was no appeal.

in the sum of $495,000 on the libel claims. On the union's appeal, however, this court held that the verdict against the union was "clearly excessive and impermissibly reflected prejudicial or punitive considerations." *Tosti* v. *Ayik*, 394 Mass. 482, 499 (1985) (*Tosti II*). We remanded the case to the Superior Court to give the defendant an opportunity to move for a new trial on damages alone based on the excessiveness of the jury's assessment. We expressly recognized the plaintiff's right under Mass. R. Civ. P. 59 (a), 365 Mass. 827 (1974), "to remit such sum as the judge considers excessive" as an alternative to a new trial on damages. *Id.*

On remand, a special master was appointed to make a recommendation concerning an appropriate remittitur. The special master had been the trial judge at the second trial before resigning as a judge of the Superior Court. The special master recommended a remittitur to $275,000, and the Administrative Justice of the Superior Court adopted the recommendation. The plaintiff accepted the remittitur. Judgment entered for the sum of $275,000, with interest thereon in the sum of $428.187.17, and the union appealed claiming that the reduced verdict was still excessive. We allowed the plaintiff's application for direct appellate review. We now affirm the judgment.

We observed in *Tosti II*, *supra* at 495, quoting from *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 861 (1975), that, in defamation cases against labor unions, concern for First Amendment rights and for Federal labor policy imposes on "both trial and appellate judges . . . a special duty of vigilance in charging juries and reviewing verdicts to see that damages are no more than compensatory." We emphasized that the plaintiff was entitled "only to fair compensation" for the losses that he had pleaded and proved. *Id.* at 496. We focused on the requirement that, for a loss to be recoverable, the fact finder must determine on the basis of adequate evidence that it was caused by the defendant's wrongful conduct. To illustrate that point, we discussed several decisions in other jurisdictions. *Id.* at 496-498. We noted that the plaintiffs in those cases were denied recovery for their alleged inability to obtain employment because the evidence was insufficient to

to show that such inability was the result of the defendants' defamatory statements. *Id.* at 497-498. See *Lawlor* v. *Gallagher Presidents' Report Inc.*, 394 F. Supp. 721 (S.D.N.Y. 1975); *Benassi* v. *Georgia-Pacific*, 662 P.2d 760 (Or. Ct. App.), modified, 667 P.2d 532 (Or. Ct. App. 1983); *Lawrence* v. *Jewell Cos.*, 53 Wis. 2d 656 (1972).

Based primarily on our discussion of those cases, the defendant now argues that in *Tosti II* we announced that a plaintiff, whose employment is terminated as a result of the libellous statements of third parties, cannot recover for that loss without also proving that new employment was unavailable due to the libel having been published to prospective employers. The defendant misreads *Tosti II*. Such a rule would not merely limit a plaintiff to truly compensatory damages. Rather, it would deny him full compensation for the wrong done to him. It has never been our intention to adopt such a rule. In all the cases that we discussed in *Tosti II* to illustrate the necessity for a plaintiff to prove a causal relationship between a defendant's wrongful conduct and the plaintiff's claimed loss, there was no claim, as there is here, that the plaintiff was fired because of the defendant's defamatory statement. In each case, the only claim of loss was that the plaintiff could not market his services because his reputation among prospective purchasers had been wrongly damaged. That claim is not made here. The only claim in this case is that the union's libel caused the plaintiff to lose his job, which in turn had harmful consequences. The relevance of the out-of-State cases discussed in *Tosti II* is limited to the principle that a plaintiff must prove a causal connection between alleged wrongs and claimed losses.

We said in *Tosti II*, *supra* at 498, that "[w]hile in this case the jury could conclude from the evidence that the plaintiff lost employment due to the defendant's article, that finding does not necessarily entitle the plaintiff to all future wages he would have otherwise earned from G.M." That, of course, is true. A plaintiff, whose employment is terminated because of a third party's tortious conduct, must make a good faith effort to mitigate damages by seeking other comparable employment,

but, if that effort is made, the plaintiff is entitled to be compensated in an amount that reflects what he would have earned had his employment not been terminated. We turn, then, to the special master's memorandum explaining his recommended remittitur.

The special master arrived at the following conclusions on adequate evidence: The plaintiff was approximately forty-four years old when his employment was terminated; he had been employed at G.M. for twenty-three years and had a good employment record, having "worked his way up from an hourly wage position to the management position of foreman . . .; while no evidence was presented that the libel was communicated to other potential employers, no comparable work in terms of pay was seemingly available for a man of plaintiff's age, experience and skill within a reasonable area of his residence . . .; plaintiff has made good faith and continuing efforts to find comparable work since the date of his termination . . .; plaintiff lost $100,000 of the income he would have earned in base pay as a General Motors foreman as a result of defendant's conduct."[3]

In concluding that "a remittitur to the sum of $275,000 is appropriate and just," the special master considered the plaintiff's loss of benefits, such as hospital, medical and life insurance, and pension rights in addition to the $100,000 loss of income. He assigned no specific monetary value to those losses other than the loss of income. Indeed, there was no evidence of their monetary value. But, in concluding that "the quality and standard of plaintiff's life was substantially affected by defendant's conduct," the special master properly took into account that the "plaintiff lost his job, the benefits incident thereto, was forced to sell his home, and was unable to find comparable work." As the special master recognized, resulting personal humiliation and mental anguish are compensable even

[3] In *Tosti II*, we noted the plaintiff's testimony that, from the time of his discharge in 1971 until the second trial in 1983, the plaintiff's total earnings "were approximately $124,000 compared to the estimated $224,000 he would have earned in base pay as a G.M. foreman." *Id.* at 497.

though their translation into money damages is necessarily imprecise. *Stone* v. *Essex County Newspapers, Inc.*, *supra* at 861.

In *Tosti II*, *supra* at 498, we characterized the evidence of harm to the plaintiff's reputation and mental suffering as "sparse indeed." Despite that characterization, however, we must acknowledge that the evidence did portray a man who, before being discharged by G.M., owned two homes that he had to sell as a result of the defendant's conduct, uprooting his family from an area in which they had lived their entire lives. Also, there was evidence that the plaintiff and his family were forced to relocate seven times to various rental properties, sell their furniture, and borrow money from relatives to survive, and there was evidence of a deterioration in the plaintiff's social life. We cannot fairly say that $275,000 more than compensates the plaintiff for the tortious wrong done to him. Accordingly, we affirm the judgment.

*So ordered.*

# AUGUSTINO TOSTI *vs.* HENRY AYIK & another.[1]

Middlesex. December 3, 1984. — April 10, 1985.

Present: HENNESSEY, C.J., LIACOS, ABRAMS, & O'CONNOR, JJ.

*Labor*, Federal preemption. *Libel and Slander. Jurisdiction*, Labor case. *Statute*, Construction. *Evidence*, Business record, Relevancy and materiality. *Practice, Civil*, Mistrial, Judgment notwithstanding verdict, Verdict. *Damages*, Libel. *Interest*.

Federal labor law did not preempt a State court's subject matter jurisdiction over an action arising from the publication in a local union newspaper of allegedly libelous statements, to the effect that the plaintiff, while a foreman in an automobile manufacturing plant, had engaged in "bargaining unit" work, contrary to a collective bargaining agreement then in force, and that he had punched repair tickets without the requisite repair work being done. [485-486]

The judge at a libel trial correctly instructed the jury that a labor union local's vicarious tort liability for the alleged libelous statements could be proved by a preponderance of the evidence. [486-488]

At the trial of a civil action the judge correctly excluded from evidence certain memoranda taken from an employer's personnel files, which were offered as business records, where the proponent failed to show that it was the business duty of the authors to prepare such memoranda in the regular course of business. [488-489]

At the trial of a libel action arising from the publication of an article in a local union newspaper, the judge did not abuse his discretion in admitting evidence of a statement made three years earlier by the union's shop chairman to the effect that he would "get" the plaintiff for his opposition to a union strike, where the statement was relevant to establish a possible union motive for the alleged libel. [489-490]

At the trial of a civil action the judge acted properly within his discretion in denying the defendants' motion for a mistrial and instead giving curative instructions to the jury, after the plaintiff's disclosure, during his direct examination, of a settlement he had received in a related case. [490]

At the trial of an action arising from the publication of allegedly libelous statements in a local union newspaper, the jury were warranted in finding, on clear and convincing evidence, that the statements were published

[1] United Auto Workers, Local 422.

with actual malice as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964), and the jury were justified in imputing the author's state of mind to the union for the purpose of establishing the union's vicarious liability. [491-494]

In a libel action against a labor union local and the author of certain statements published in the union newspaper, the judge correctly denied the defendants' motions for judgment notwithstanding the verdicts and for a new trial. [494-495]

In an action arising from the publication of alleged libelous statements in a union newspaper concerning the plaintiff, a foreman in an automobile manufacturing plant, an award of $495,000 damages against the union was clearly excessive, and reflected impermissible considerations, where, although the jury could conclude from the evidence that the plaintiff had lost his employment as a result of the statements, the record reflected no proof that the plaintiff's failure to find full-time employment for an eleven-year period was the result of the tortious acts and where evidence of other consequences to the plaintiff was sparse. [495-499]

In computing interest on verdicts for the plaintiff in a civil action, the judge correctly gave retroactive effect to the twelve percent interest rate fixed by G. L. c. 231, § 6B, as amended through St. 1982, c. 183. [499-500]

TORT. Writ in the Superior Court dated August 6, 1973.

Following review by the Supreme Judicial Court reported in 386 Mass. 721 (1982), the case was retried before *Rudolph F. Pierce*, J.

The Supreme Judicial Court granted a request for direct appellate review.

*Gary R. Greenberg* for the defendants.

*Robert L. Bouley* (*Karen M. Thursby* with him) for the plaintiff.

HENNESSEY, C.J. This is an appeal by the defendants Henry Ayik and United Auto Workers, Local 422 (union), from judgments entered against them in the Superior Court. In that action the plaintiff alleged that he was the subject of a defamatory article, written by Ayik and published in the union's newspaper. The article, which appears in the margin,[2] alleged that the plain-

[2] "On Monday, June 7th [1971,] at 11:34 P.M. Gus Tosti foreman in the electrical hole, was working on job # 603677, a green 4 door Pontiac, T37. Pete Hanningson (rank unknown) was standing guard next to him. This is how Gus repairs cars. He has an inspection punch, #K2 and if he

tiff, who was employed as a foreman for General Motors Corporation (G.M.), was engaging in "bargaining unit" work, i.e., union work, contrary to the provisions of the union's contract with the company. Specifically, the article accused the plaintiff of punching vehicle repair tickets without performing the requisite repair work.[3] The newspaper was distributed to union and management personnel on June 15, 1971. The plaintiff was suspended on the morning following the distribution, after being called to the plant manager's office, where mention of the article was made. On June 18, 1971, G.M. discharged the plaintiff for allegedly punching the vehicle repair tickets of unrepaired vehicles.

In 1973, the plaintiff brought an action against several representative officers and members of the union for libel and tortious interference with an employment relationship.[4] The jury returned verdicts against the union and against two of the individual defendants, Henry Ayik and Baheege Ayik.[5] The defendants appealed and this court reversed the judgments and ordered a new trial. *Tosti* v. *Ayik*, 386 Mass. 721 (1982) (*Tosti I*).

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reverses the punch it's K5. He was punching all the items on the ticket. This sort of thing goes on constantly. We have men who work in the Inspection Department checking these cars for defects. After writing the defects down the foremen fix them by punching the ticket out. Now, I understand why so many cars are shipped from the electrical hole. GM's mark of excellence means nothing to them. If you're ever picked as a driver for the electrical hole first, blow the horn, next try the brakes and good luck!!"

[3] The plaintiff acknowledged that he performed repairs and punched repair tickets in violation of the union's contract but denied that he had ever punched an item that he had not personally repaired.

[4] At the time the plaintiff commenced this action, a labor union, as an unincorporated voluntary association, could not be sued in its own right. *Members of Bakery & Confectionary Workers Int'l Union, Local 458* v. *Hall Baking Co.*, 320 Mass. 286 (1946). However, we subsequently altered this rule and held that unions will be considered "legal entities for the purpose of suing or being sued." *DiLuzio* v. *United Elec., Radio & Mach. Workers, Local 274*, 386 Mass. 314, 314 (1982).

[5] At the first trial, the parties stipulated to dismissal, without prejudice, of all counts filed against individual defendants other than Henry Ayik, author of the article, and Baheege Ayik, shop chairman of the union.

Upon retrial, the jury found for all defendants on the plaintiff's claim of tortious interference with an employment relationship. It further found for the defendant Baheege Ayik on the libel claim. However, the jury returned verdicts for libel against Henry Ayik in the amount of $5,000, and against the union in the amount of $495,000.[6] Ayik and the union unsuccessfully moved for judgment notwithstanding the verdicts and for a new trial on the libel counts. Both defendants appealed and we granted their application for direct appellate review.

On appeal, the defendants argue that (1) the subject matter jurisdiction of the State court was preempted by Federal labor law; (2) the judge erred in failing to require "clear and convincing evidence" of the union's liability for Ayik's actions; (3) various evidentiary rulings constituted reversible errors; (4) the plaintiff failed to prove Ayik's malice by clear and convincing evidence and therefore the defendants were entitled to directed verdicts; (5) the judge erred in denying their motions for judgments notwithstanding the verdicts or, alternatively, for a new trial; (6) the damage awards were inconsistent and the award against the union was excessive; (7) interest on the awards was erroneously computed due to the judge's misinterpretation of G. L. c. 231, § 6B. We affirm the judge's rulings on all issues, except as regards the excessive damages awarded against the union.

1. *Preemption.*

The defendants contend that State courts lack subject matter jurisdiction over the plaintiff's libel claim as a result of the recent United States Supreme Court decision in *Local 926, Int'l Union of Operating Eng'rs* v. *Jones*, 460 U.S. 669 (1983). We disagree. In previously considering the defendants' preemption claim, we stated that "Federal labor law preempts State libel law to the extent that defamatory statements made in the context of a labor dispute are actionable only if made with knowledge of their falsity or with reckless disregard of the

[6] With interest added pursuant to G. L. c. 231, § 6B, judgment was entered against Ayik individually in the amount of $5,866.70 and against the union in the amount of $580,803.30.

truth. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 273 (1974). *Linn* v. *United Plant Guard Workers Local 114*, 383 U.S. 53, 61 (1966). In other words, State courts may grant relief in such defamation actions only if the defamatory statements were made with actual malice, as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964)." *Tosti I, supra* at 723.[7] The Supreme Court's decision in *Local 926, Int'l Union of Operating Eng'rs, supra*, did not change, but rather reaffirmed, this rule. There the Court held that a cause of action against a union for tortious interference with an employment relationship was preempted because the claim was not "so deeply rooted in local law" as to outweigh "the interference with the federal labor law that prosecution of the state action would entail." 460 U.S. 669, 683 (1983). At the same time, however, the Court distinguished and reaffirmed its earlier holding in *Linn* v. *United Plant Guard Workers Local 114, supra*, "that an action for a malicious and injurious libel in the course of a labor dispute . . . was not pre-empted since it was unprotected conduct and since remedying injury to reputation was of only slight concern to the national labor policy and was a matter deeply rooted in state law." *Local 926, Int'l Union of Operating Eng'rs, supra* at 681 n.11. We therefore see no reason to reconsider the defendants' preemption claim and conclude that our decision in *Tosti I, supra* at 723, remains controlling.

2. *Union Liability.*

The defendants claim that the judge erred in instructing the jury that, in order to hold the union liable for Ayik's article, "the plaintiff must prove by the greater weight of the believable evidence that either or both defendants were acting on behalf of the local and within the scope of their responsibilities for the local when the material in question was published." They contend that G. L. c. 149, § 20B, which is modeled after § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (1982),

[7] In *Tosti I, supra*, we held that "the article in question here was published in the context of a labor dispute" and therefore "[jury] instructions on actual malice need [to] be given."

requires proof of a union's vicarious tort liability by clear and convincing evidence.

General Laws c. 149, § 20B, inserted by St. 1935, c. 407, § 1, states: "No officer or member of any association or organization, and no association or organization, participating or interested in a labor dispute . . . shall be held responsible or liable in any court for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." In *Tosti I, supra* at 723-724, we noted that the article in question was "published in the context of a labor dispute" because "[a] dispute over supervisory personnel doing bargaining unit work is a controversy concerning terms and conditions of employment." See G. L. c. 149, § 20C (*c*). We stated that "[w]e cannot separate the allegedly defamatory statement from the protected activity concerning the terms and conditions of employment." *Tosti I, supra* at 724.

General Laws c. 149, § 20B, however, was intended to govern union liability in actions arising from violent labor disputes, such as injunction and contempt proceedings. The statute was originally enacted as § 1 of St. 1935, c. 407, "An Act relative to injunction and contempt procedure in labor disputes." "While the title to an act cannot control the provisions of the statute, the title may be used for the purpose of ascertaining its proper limitation." *Commonwealth* v. *Graham*, 388 Mass. 115, 120 (1983), and cases cited. We have noted in the past that the enactment of c. 407 "followed a recommendation of the Governor that the laws relating to injunctions in labor disputes 'should be liberalized and strengthened,' and . . . that the Norris-LaGuardia Act should be adopted 'as a basis for the drafting of the required state legislation.'" *Simon* v. *Schwachman*, 301 Mass. 573, 581 (1938), quoting 1935 Senate Doc. No. 1. See *Fashioncraft, Inc.* v. *Halpern*, 313 Mass. 385, 389 (1943); *Mengel* v. *Superior Court*, 313 Mass. 238, 245 (1943).

Our interpretation of the scope of G. L. c. 149, § 20B, is bolstered by the United States Supreme Court's discussion of

the purpose of the Norris-LaGuardia Act. "[T]he simple concern of Congress was that unions had been found liable for violence and other illegal acts occurring in labor disputes which they had never authorized or ratified and for which they should not be held responsible. . . . The straightforward answer was § 6, with its requirement that when illegal acts of any individual are charged against one of the major antagonists in a labor dispute — whether employer or union — the evidence must clearly prove that the individual's acts were authorized or ratified." *Ramsey* v. *UMW*, 401 U.S. 302, 310 (1971). See *United Bhd. of Carpenters* v. *United States*, 330 U.S. 395, 403 (1947).

Other jurisdictions which have enacted legislation patterned after the Norris-LaGuardia Act have held that their analogous statutes do not apply to cases charging unions with tort liability. See, e.g., *Nelson* v. *Haley*, 232 Ind. 314, 318 (1953); *Buchanan* v. *International Bhd. of Teamsters*, 94 Wash. 2d 508, 511 (1980). While the Connecticut cases relied upon by the defendants do involve union tort liability, there too the alleged torts arose in the context of a violent labor dispute. In *Benoit* v. *Amalgamated Local 299 United Elec. Radio & Mach. Workers*, 150 Conn. 266, 274-275 (1963) and *United Aircraft Corp.* v. *International Ass'n of Machinists*, 161 Conn. 79, 87-88 (1971), cert. denied, 404 U.S. 1016 (1972), the court applied the analogous Connecticut statute where the injuries suffered resulted from assaults and batteries associated with union picketing.

For these reasons, we conclude that the labor dispute encompassing the libel alleged here is beyond the intended scope of G. L. c. 149, § 20B. We therefore affirm the judge's ruling regarding the standard of proof required to impose liability on the union for publication of Ayik's article.

3. *The Judge's Evidentiary Rulings.*

The defendants challenge three of the judge's evidentiary rulings and claim each error provides ground for reversal. First, they contend that the judge erred in refusing to admit purported business records of G.M. regarding the plaintiff's termination. The defendants sought to introduce as business records, pur-

suant to G. L. c. 233, § 78, four memoranda from G.M.'s personnel files which were prepared in connection with the company's investigation of the plaintiff's conduct. The documents contained information from secondary sources as well as from the personal knowledge of their authors.

Although the judge failed to disclose the basis for his exclusion of the documents, we infer from his ruling that he was not satisfied that the statutory prerequisites had been met. *Omansky* v. *Shain*, 313 Mass. 129, 132 (1943). Because the defendants failed to show that it was the business duty of each of the authors to prepare such memoranda in the regular course of business, they failed to comply with at least one of the prerequisites to G. L. c. 233, § 78. See *Wingate* v. *Emery Air Freight Corp.*, 385 Mass. 402, 406 (1982) ("The preparer's hearsay sources must carry the same indicia of reliability, arising from regularity and business motives, that bring his own act of recording the information within the statutory exception"); *Kelly* v. *O'Neil*, 1 Mass. App. Ct. 313, 316 (1973) (second level of hearsay inadmissible under G. L. c. 233, § 78).

The defendants argue that even if G.M.'s records were inadmissible under G. L. c. 233, § 78, the judge should have ruled them admissible as past recollections recorded. However, since nothing in the record suggests that the defendants offered the documents for this purpose, they may not rely on this ground for the first time on appeal. *National Granite Bank* v. *Tyndale*, 179 Mass. 390, 393-394 (1901).

The defendants also contend that the judge erred in admitting a statement allegedly made by the defendant Baheege Ayik in 1968, to the effect that he intended to "get" the plaintiff for the latter's opposition to a union strike that year. The defendants moved in limine to exclude the statement as irrelevant and prejudicial. The plaintiff argued that the statement was relevant to establish a possible union motive for the alleged libel.

We have stated that, "[i]n determining whether the evidence offered serves any valid purpose we apply the rule that it must merely render the desired inference more probable than it would be without the evidence." *Green* v. *Richmond*, 369 Mass. 47,

59 (1975). In "the great majority of instances," the offering party is entitled to the evidence. *Id.* If it is possible that the probative value of the evidence is outweighed by its prejudicial effect, the question of admissibility is "determined in the sound discretion of the judge." *Id.* at 60.

We cannot say the judge abused his discretion in admitting the challenged statement. While the fact that the statement was made three years prior to the publication of the article in question may affect the weight it should be given, remoteness in time does not render the statement irrelevant. *Sherburne* v. *Meade,* 303 Mass. 356, 360 (1939). See *Murray* v. *Foster,* 343 Mass. 655, 657 (1962) (whether evidence is too remote in time for purpose offered is decision squarely within the discretion of trial judge).

Finally, the defendants charge that the judge abused his discretion in denying their motion for a mistrial. The defendants moved for a mistrial after the plaintiff referred, during his direct examination, to a separate suit he had brought against G.M. which he subsequently settled for $6,048 in severance pay. The defendants objected to the plaintiff's testimony as irrelevant and prejudicial since the jury could incorrectly infer that the settlement referred to represented an acknowledgment by G.M. that the plaintiff was wrongfully discharged. In response to their objection, the judge instructed the jury to disregard any references to other lawsuits and, pursuant to a stipulation of the parties, the jury were also informed that the sum received by the plaintiff represented accrued benefits in the form of severance pay. The judge reasonably concluded that these curative steps defused the prejudicial effect of the plaintiff's testimony. We are satisfied that there was no abuse of discretion in his denial of the defendants' motion for a mistrial. See *Riley* v. *Davison Constr. Co.,* 381 Mass. 432, 444-446 (1980) (motion for mistrial properly denied where judge's clarifying instructions cured juror confusion); *Shea* v. *D. & N. Motor Transp. Co.,* 316 Mass. 553, 555 (1944) (judge "not obliged to declare a mistrial, provided he adequately guarded against all improper effect").

4. *Evidence of Malice.*

The defendants next claim error in the judge's denial of their motions for directed verdicts. They contend that the plaintiff failed to show, by clear and convincing evidence, that the article in question was published with actual malice and therefore the jury should not have been allowed to decide the libel issue. We disagree. As a general rule, in considering a motion for a directed verdict, "[t]he question is whether the evidence, construed most favorably to the plaintiff, could not support a verdict for the plaintiff." *Poirier* v. *Plymouth*, 374 Mass. 206, 212 (1978). In defamation cases governed by the *New York Times Co.* v. *Sullivan* standard, we are under a constitutional obligation to determine "whether the jury would be warranted in concluding that malice was proved by clear and convincing evidence." *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 870 (1975). On appeal "those portions of the record which relate to the actual-malice determination must be independently assessed." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 n.31 (1984). If the facts, considered in the light most favorable to the plaintiff, were sufficient for the jury to find clear and convincing evidence[8] of the defendants' malice, then the judge properly denied the directed verdict motions.

Before reviewing the facts before the jury, we reiterate that "[a]ctual malice is not necessarily proved in terms of ill will or hatred, but is proved rather by a showing that the defamatory falsehood was published with knowledge that it was false or reckless disregard of whether it was false." *Stone, supra* at 867. For the jury to find that a publication was made in reckless disregard of the truth, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.*, quoting

[8]The plaintiff claims that the clear and convincing standard of proof should not apply to libel actions against labor unions where the *New York Times* malice standard is adopted by analogy rather than constitutionally mandated. *Linn* v. *United Plant Guard Workers Local 114*, 383 U.S. 53, 64-65 (1966). If there was error it was rendered harmless by the jury's verdict for the plaintiff based upon a clear and convincing standard of proof.

*St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). "[T]he test is entirely a subjective one. . . . [T]he jury must find that such doubts were in fact entertained by the defendant, or by the defendant's servant or agent acting within the scope of his employment." *Stone, supra* at 868. In order to determine the defendant's state of mind, the jury are entitled to draw inferences from the objective evidence. *Id.*

Based upon the evidence presented, the jury could have found the following facts relevant to their determination of the defendants' malice. On June 7, 1971, the night in which the defendant Ayik claimed to make the observations contained in his article, he was "chasing stock" for as many as forty repairmen. Consequently, he was away from the electrical hole area, where both he and the plaintiff were stationed, for substantial periods of time, including the fifteen minute period prior to making the observations alleged in his article. Ayik testified that after returning to his work area, he watched the plaintiff go down a line of six cars, take repair tickets off the windshields, and punch the repair tickets. He then confronted the plaintiff, wrote down the job numbers of the cars, and informed the plaintiff that he intended to file a grievance.

Despite the fact that his article refers to cars leaving the electrical hole with defective horns and brakes, potential safety hazards, Ayik conceded that he did not know how to read the repair tickets and therefore had no idea what repairs were actually designated on the tickets. Nor did he claim to know whether any of the cars with tickets punched by the plaintiff had safety problems or improper repairs. When Ayik was asked why the plaintiff could not have made the designated repairs while the defendant was out of the area, he replied, "Because I watched [the plaintiff] in a three-month period, and he was out in that repair yard punching tickets and flagging them. . . . And they were never repaired." Ayik testified that during April and May of 1971, he observed the plaintiff two or three nights a week punching tickets on cars in the repair yard without ever making repairs. He further testified that in writing the article, he "wasn't complaining about the repair," but "only complaining about the punch. That's all I wanted taken away was the punch."

Contrary to Ayik's testimony, the plaintiff stated that he did not work the night shift during April and May of 1971, the time in which the defendant claimed to have observed him punching tickets of unrepaired vehicles. Although he acknowledged that he had performed minor repairs and punched repair tickets in violation of the union contract, including the night of June 7, 1971, the plaintiff testified that he never punched an item on an unrepaired vehicle.

This evidence, if believed by the jury, was sufficient to provide clear and convincing proof[9] that Ayik either published his article based on fabricated observations of the plaintiff or, at the least, entertained serious doubts as to the truth of his allegations. The defendant conceded that he did not particularly care whether the plaintiff failed to repair the vehicles. Instead, he testified that he was motivated to write the article because the plaintiff was performing bargaining unit work, i.e., punching repair tickets. The jury could therefore have found that this motive led the defendant to either fabricate the other charges or to make his accusations based on suspicions and not facts. This conclusion would have been particularly warranted if the jury found that the defendant could not have observed the plaintiff on the job during April and May. The defendant testified that his prior observations of the plaintiff during these months formed the "sole" basis for his allegation that the plaintiff performed no repairs on the night of June 7, 1971. Because the jury found that the defendant Ayik was acting within the scope of his union responsibilities when he wrote the article and submitted it for publication, they were justified in imputing his state of mind to the union for the purpose of establishing the union's vicarious liability. *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 253-254 n.6 (1974). *Stone, supra* at 868.

[9] "Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases." *Stone, supra* at 871. The evidence must be sufficient to convey to a "high degree of probability" that the defendant acted with substantial doubts about the truth of the statement. *Callahan* v. *Westinghouse Broadcasting Co.*, 372 Mass. 582, 588 n.3 (1977).

For these reasons, we conclude that the jury would have been warranted in finding that the defendants' malice was proved by clear and convincing evidence. Therefore the judge properly denied the defendants' motions for directed verdicts. This is true regardless of whether he or we would personally have been convinced by the same evidence. *Stone, supra* at 870 n.11. *Id.* at 873 (Quirico, J., concurring in part and dissenting in part).

5. *Motion for a New Trial.*

The defendants contend that their motions for judgments notwithstanding the verdicts or, in the alternative, for a new trial should have been granted. When acting on a defendant's motion for judgment notwithstanding the verdict, the judge's task, "taking into account all the evidence in its aspect most favorable to the plaintiff, [is] to determine whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict for the plaintiff." *Rubel* v. *Hayden, Harding & Buchanan, Inc.*, 15 Mass. App. Ct. 252, 254 (1983). Conflicting evidence alone does not justify judgment notwithstanding the verdict. *O'Shaughnessy* v. *Besse*, 7 Mass. App. Ct. 727, 729 (1979). "[I]t is of no avail for the defendant to argue that there was some or even much evidence which would have warranted a contrary finding by the jury." *Curtiss-Wright Corp.* v. *Edel-Brown Tool & Die Co.*, 381 Mass. 1, 4 (1980), quoting *Chase* v. *Roy*, 363 Mass. 402, 407 (1973). The court may not substitute its judgment of the facts for that of the jury. *O'Shaughnessy, supra* at 728. These well-settled rules regarding the respective roles of judge and jury do not change in defamation cases. It remains the case that "[w]hen the testimony of a witness is not believed, the trier of fact may simply disregard it." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984). Even if conflicting evidence was introduced from which the jury could have found that the charges against the plaintiff were either true or not made with actual malice, the jury were free to believe or disbelieve the evidence presented. We have already concluded that the jury, crediting the evidence most favorable to the plaintiff, would

have been warranted in reaching their verdicts. Consequently, there was no error in the judge's denial of the defendants' motions for judgments notwithstanding the verdicts.

As to the defendants' alternative motions for a new trial, it is clear from our summary of the evidence, above, that these motions (except as to the amount of damages; see discussion, *infra*) rested in the sound discretion of the judge, and consequently there was no error in his denial of the motions.

6. *Damages.*

The defendants further assert that the libel verdicts are inconsistent, in light of: (1) the verdicts for them on the plaintiff's count for intentional interference with an employment relationship and (2) the disparity in the $5,000 verdict against Ayik and the $495,000 verdict against the union. By failing to raise this objection prior to the dismissal of the jury, the defendants deprived the judge of the opportunity to correct any possible errors in the jury's deliberations. Consequently, they waived their right to attack the verdicts as inconsistent on appeal. *Bradley* v. *Fessenden*, 349 Mass. 429, 429-430 (1965). *Feaver* v. *Railway Express Agency, Inc.*, 324 Mass. 165, 169 (1949).

There is merit, however, in the defendants' contention that the verdict against the union is excessive. We agree that the $495,000 award is clearly excessive and "may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship." *Stone, supra* at 860. In defamation cases, "[b]ecause of constitutional considerations, and the potential difficulties in assessing fair compensation . . . both trial and appellate judges have a special duty of vigilance in charging juries and reviewing verdicts to see that damages are no more than compensatory." *Id.* at 861. Our Federal labor policy similarly demands heightened scrutiny in reviewing libel awards against unions. "[I]n view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions." *Linn* v. *United Plant Guard Workers Local, 114*, 383 U.S. 53, 64 (1966). See *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 291 (1974) (Douglas, J., concurring) ("community attitudes toward unionization" influence libel awards against unions).

Both the Legislature and this court have prohibited awards of punitive damages in libel actions, even upon proof of actual malice. *Stone, supra* at 860-861. G. L. c. 231, § 93. The plaintiff is entitled only to fair compensation for his actual damages, including his mental suffering and harm to his reputation, and for any special damages he has suffered which have been pleaded and proved. *Stone, supra* at 860. Because First Amendment rights are at stake, we are not slow to pronounce a verdict excessive in defamation cases, *Stone, supra* at 861, even though by doing so we must necessarily substitute our assessment of reasonable damages for that of the jury. See *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 160 (1967) (plurality opinion) (constitutional guarantee of freedom of speech and press is served by judicial control over excessive verdicts).

In this case, the judge instructed the jury that if they decided the plaintiff lost his employment as a result of the defamation, they could hold the defendants "responsible for any damages resulting from the loss." We assume from the size of the verdict that the jury probably found that the defendants caused the plaintiff's discharge by their libellous publication. However, we are not convinced that the evidence presented by the plaintiff regarding the consequences of his discharge was sufficient to justify a $495,000 award.

The testimony regarding the plaintiff's employment with G.M. established the following facts. In 1971, as a foreman of drivers of unlicensed cars, he earned approximately $11,800 a year in base pay. From late August through late December of each year, the period in which production began on new automobile models, the plaintiff commonly worked substantial overtime hours and earned up to double or triple his base pay. However, overtime was not guaranteed and the plaintiff did not know how his overtime pay was calculated. At G.M. the plaintiff also received pension, stock, and medical benefits although he did not present any evidence as to their value. After the plaintiff was discharged, at the age of forty-four, he received $6,000 in severance pay. There was additional testimony by G.M. personnel that, by 1980, an employee in the

plaintiff's former position was earning some $27,600 a year in base pay.

The plaintiff also testified as to his yearly earnings from the time of his discharge in 1971 until the second trial in 1983. During those years he was employed on temporary jobs as a laborer, construction worker, and carpenter with yearly earnings ranging from a low of $2,300 to a high of $18,700. His total earnings during this period were approximately $124,000 compared to the estimated $224,000[10] he would have earned in base pay as a G.M. foreman.

There was evidence that the plaintiff and his family suffered financial hardship in the years after his discharge. However, where substantial damages are awarded as compensation for earnings allegedly lost as a result of defamation, courts will seek proof that a plaintiff's inability to find comparable work was actually caused by a defendant's tortious act. For example, in *Lawlor* v. *Gallagher Presidents' Report, Inc.*, 394 F. Supp. 721 (S.D.N.Y. 1975), the plaintiff, a former corporate officer, claimed that he was unable to obtain employment in his field as a result of defamatory statements concerning the circumstances of his resignation. In his mid-forties at the time of the libel, he sought damages of $95,000 per year until he reached retirement age. New York law, like our own, limits a plaintiff's recovery in defamation actions to compensatory damages that are proved by competent evidence. *Id.* at 733. The court denied the plaintiff's claim for lost earnings because he failed to prove that "the publication of the falsehood was a material element or substantial cause of his inability to get a job." *Id.* at 735. Similarly, in *Benassi* v. *Georgia-Pacific*, 62 Or. App. 698 (1983), modified, 63 Or. App. 672 (1983), the plaintiff alleged that as a result of his employer's slanderous remarks regarding his discharge, he was prevented from securing other employment and ultimately was

[10] We recognize that with overtime pay and employment benefits, the plaintiff could potentially have received significantly higher yearly earnings from G.M. However, on the basis of the record presented, we are unable to competently estimate the additional income he would have received from these sources.

forced to accept a position at a lower rate of pay. The court held there was insufficient proof of special damages because the plaintiff failed to show that he "would have obtained [employment] but for the currency of the slander." 62 Or. App. at 705. Because the plaintiff did not claim that any potential employers were aware of the defamatory statements, the court concluded that "it would be mere speculation to permit the jury to infer that the plaintiff was unable to obtain a new job . . . because of the defamation." 62 Or. App. at 709. In *Lawrence* v. *Jewell Cos.*, 53 Wis. 2d 656 (1972), the plaintiff also contended that he was unable to find steady employment as a result of defamatory statements made by his former employer. Noting that "[t]he record is devoid of any direct evidence that a slanderous statement was made to a prospective employer," *id.* at 660, that court concluded that the jury's compensatory award of $25,000 was excessive and reduced it to $12,000. *Id.* at 661-662.

While in this case the jury could conclude from the evidence that the plaintiff lost employment due to the defendants' article, that finding does not necessarily entitle the plaintiff to all future wages he would have otherwise earned from G.M. In *Hanson* v. *Innis*, 211 Mass. 301 (1912), we considered the damages due a foreman who had been discharged as a result of union demands. There we held that the plaintiff was entitled to recover his lost wages "past and future," *id.* at 306, because he produced evidence showing that his discharge and his inability to obtain other work were caused by the unlawful acts of the defendants. *Id.* at 305. In this case, the record presents no comparable proof that the plaintiff's failure to obtain full-time employment from 1971 through 1982 was due to the defendants' tortious acts. Cf. *Faulk* v. *Aware, Inc.*, 19 A.D.2d 464, 470 (N.Y. 1963) (potential employers testified they would not hire plaintiff as result of defamation).

In defamation cases, other causally related consequences, such as harm to reputation and mental suffering, are compensable where the awards are supported by competent evidence. *Stone, supra* at 860-861. Here, however, the evidence establishing such damages is sparse indeed. The record contains

testimony by the plaintiff's wife that the plaintiff was "shook up" on the day of his discharge and lay down when he returned home, which was very unusual for him to do. There was no suggestion that the plaintiff received any medical or psychiatric treatment as a result of the libel.

Given the evidence the plaintiff submitted as to proof of his damages, we conclude that the jury's award of $495,000 against the union was clearly excessive and impermissibly reflected prejudicial or punitive considerations.[11] Accordingly, we shall remand the case to the Superior Court where, upon a motion for a new trial under Mass. R. Civ. P. 59 (a), 365 Mass. 827 (1974), filed by the defendant union within a reasonable time after the rescript herein, the trial judge shall reconsider solely the issue of the excessive damages. Before a new trial is granted[12] the plaintiff shall, of course, under rule 59 (a), be given an opportunity to remit such sum as the judge considers excessive. *D'Annolfo* v. *Stoneham Hous. Auth.*, 375 Mass. 650, 661 (1978). Because First Amendment rights are at stake, the court must in this proceeding, and any subsequent proceedings which may follow in this case, bring close scrutiny to the damages assessed. See *Stone*, *supra* at 860.

7. *Interest.*

Finally, the defendants challenge the judge's computation of interest on the verdicts at a rate of 12% per annum from June 13, 1973, the date of the commencement of the action, to March 23, 1983, the date the judgments were entered. The judge awarded interest retroactively pursuant to G. L. c. 231, § 6B, which applies a 12% rate of interest "to all actions in which damages are assessed on or after the effective date of

[11] We note that during the course of their deliberation, the jury specifically inquired of the judge whether they could find the union liable for defamation "whether or not either defendant be liable of any charge."

[12] Any new trial herein will be confined to the issue of damages. Rule 59 has no specific limitation as to the issues available in such a retrial but the statutory predecessor to the rule (see G. L. c. 231, § 128, repealed by St. 1973, c. 1114, § 205), pursuant to what we think was sound policy, limited a new trial granted for excessive damages to that issue solely. *D'Annolfo* v. *Stoneham Hous. Auth.*, 375 Mass. 650, 662 (1978).

this act." St. 1982, c. 183, § 4.[13] The 1982 act became effective on July 1, 1982; damages were assessed against the defendants on March 23, 1983. Cf. *Patry* v. *Liberty Mobilehome Sales, Inc.*, *ante* 270, 273 (1985) (where trial judge assessed plaintiff's damages in 1981, 12% interest rate did not apply).

Relying upon *Porter* v. *Clerk of the Superior Court*, 368 Mass. 116, 116 (1975), the defendants contend that G. L. c. 231, § 6B, was not intended to be fully retroactive in application. However, in the *Porter* case, the issue was whether St. 1974, c. 224, § 1, amending G. L. c. 231, § 6B, was to be given retroactive effect. The 1974 amendment "contained no provision comparable to § 4 of St. 1982, c. 183" and therefore *Porter* "is inapposite" when interpreting the statute as most recently amended. *Mirageas* v. *Massachusetts Bay Transp. Auth.*, 391 Mass. 815, 821 n.9 (1984). We therefore see no error in the judge's retroactive application of G. L. c. 231, § 6B.

8. *Conclusion.*

In sum, we conclude that (1) State court subject matter jurisdiction over the plaintiff's libel claim was not preempted by Federal law; (2) the jury were properly instructed as to the standard of proof to apply in determining the union's potential liability for its agent's actions; (3) the judge properly refused to admit G.M. documents as business records under G. L. c. 233, § 78, and properly denied the defendants' motion in limine and motion for a mistrial; (4) the defendants' malice was established by clear and convincing evidence; (5) the judge made no error in denying the defendants' motions for judgments notwithstanding the verdicts or (aside from the excessive damages) for a new trial; and (6) the judge correctly awarded interest pursuant to G. L. c. 231, § 6B.

[13] General Laws c. 231, § 6B, as amended through St. 1982, c. 183, § 2, states: "In any action in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damage to property, there shall be added by the clerk of the court to the amount of damages interest thereon at the rate of twelve per cent per annum from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law."

The judgment against the individual defendant is affirmed. However, because the jury's damage award against the union was excessive, we remand the case to the Superior Court where, upon an appropriate motion by the defendant union, an order for remittitur is to be entered in an amount to be determined by the trial judge. If the opportunity for remittitur is declined by the plaintiff, a new trial is to be ordered in the case against the union, confined to the issue of damages.

*So ordered.*

# AUGUSTINO TOSTI *vs.* BAHEEGE AYIK & another.[1]

Middlesex. March 3, 1982. — July 9, 1982.

Present: HENNESSEY, C.J., ABRAMS, NOLAN, & O'CONNOR, JJ.

*Labor*, Federal preemption. *Libel and Slander. Jurisdiction*, Labor case. *Constitutional Law*, Federal preemption. *Words*, "Labor dispute."

Allegedly libelous statements, published in a local union newspaper, to the effect that the plaintiff, a foreman in an automobile manufacturing plant, had engaged in bargaining unit work, contrary to a collective bargaining contract then in force, and that he had punched repair tickets without the requisite work being done, were, in the circumstances, made in the context of a "labor dispute," within the contemplation of 29 U.S.C. § 152(9) (1976), so that the plaintiff's action for libel, based on the statements, was governed by Federal labor law and relief could be granted by a State court only on proof that the statements were made with actual malice, as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). [723-725]

A defendant's claim that an action for libel was preempted by Federal labor law raised a question of subject matter jurisdiction, which could properly be considered for the first time on appeal. [725-726]

A claim by a foreman against members of a labor union alleging tortious interference with his employment, based upon libelous statements in a local union newspaper which resulted in his discharge, was not preempted by Federal labor law, so that if the plaintiff prevailed on the separate claim for libel he could prevail on the claim for tortious interference if successful in proving that his discharge was due to such unprotected union activity. [726-729]

TORT. Writ in the Superior Court dated August 6, 1973.

The action was tried before *Good*, J.

The Supreme Judicial Court granted a request for direct appellate review.

[1] The other defendant is Henry Ayik. Both defendants were sued individually and as officers and members of the United Auto Workers, Local 422.

*Michael P. Angelini* (*Vincent F. O'Rourke, Jr.*, with him) for the defendants.

*Robert L. Bouley* (*James W. Luby & Karen M. Thursby*, with him) for the plaintiff.

NOLAN, J. This action arises out of the publication by the defendants of an article in a local union newspaper. The article, which appears in the margin,[2] made two intertwining allegations about the plaintiff. One was that he was engaged in bargaining unit work contrary to the contract then in force between the employer, General Motors, and the union, United Auto Workers, Local 422. The other was that he was punching repair tickets without the requisite work having been done.[3] The newspaper was distributed to both union and management personnel. On the morning following distribution, the plaintiff was called to the plant manager's office, where mention of the article was made. Two days later the plaintiff was fired.

The defendant Baheege Ayik was shop chairman of the local union at all times material to this action. The defendant Henry Ayik, who wrote the article based on his witnessing the purported events described therein, was a union member at all times pertinent to this action.

The plaintiff brought an action claiming that he was libelled by the article and that the defendants tortiously interfered with his employment by publishing the article. A

[2] "On Monday, June 7th, [1971,] at 11:34 P.M. Gus Tosti foreman in the electrical hole, was working on job # 603677, a green 4 door Pontiac, T37. Pete Hanningson (rank unknown) was standing guard next to him. This is how Gus repairs cars. He has an inspection punch, # K2 and if he reverses the punch it's K5. He was punching all the items on the ticket. This sort of thing goes on constantly. We have men who work in the Inspection Department checking these cars for defects. After writing the defects down the foremen fix them by punching the ticket out. Now, I understand why so many cars are shipped from the electrical hole. GM's mark of excellence means nothing to them. If you're ever picked as a driver for the electrical hole first, blow the horn, next try the brakes and good luck!!"

[3] Both the defendants and the plaintiff subscribe to these two possible constructions of the article.

jury found for the plaintiff, and the trial judge denied motions for a new trial and judgment notwithstanding the verdict. The defendants appealed and this court granted their application for direct appellate review. For reasons which will appear below, we are ordering that a new trial be held on both the libel claims and the tortious interference claim.

1. *Preemption of the libel claim.* Federal labor law preempts State libel law to the extent that defamatory statements made in the context of a labor dispute are actionable only if made with knowledge of their falsity or with reckless disregard of the truth. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 273 (1974). *Linn* v. *Plant Guard Workers Local 114*, 383 U.S. 53, 61 (1966). In other words, State courts may grant relief in such defamation actions only if the defamatory statements were made with actual malice, as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964).

The question as to whether instructions on actual malice need be given in this case turns, then, on whether the allegedly defamatory article was published in the context of a labor dispute. The term "labor dispute" includes "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9) (1976). We note that "[r]arely have courts found concerted union activity to fall outside this broad definition. Where the union acts for some arguably job-related reason and not out of pure social or political concerns, a 'labor dispute' exists." *Hasbrouck* v. *Sheet Metal Workers Local 232*, 586 F.2d 691, 694 n.3 (9th Cir. 1978). The term "labor dispute" should be broadly and liberally construed. *United Elec. Coal Cos.* v. *Rice*, 80 F.2d 1, 5 (7th Cir. 1935), cert. denied, 297 U.S. 714 (1936).

We hold that the article in question here was published in the context of a labor dispute. There were, arguably, two

reasons why the article was published. One was to call attention to a supervisory employee doing bargaining unit work, to the harm of union members. The other was to injure the reputation of the plaintiff by alleging that he claimed to have done repair work that he knew had not been done. Evidence adduced at trial was that the former was an important concern of the union. A dispute over supervisory personnel doing bargaining unit work is a controversy concerning terms and conditions of employment. Cf. *Aladdin Indus., Inc.*, 22 N.L.R.B. 1195, 1216 & n.11 (1940) (dispute involving discharge or demotion of supervisor who is objectionable to employees is a labor dispute). We cannot separate the allegedly defamatory statement from the protected activity concerning the terms and conditions of employment. Whether the Federal labor law "partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a 'labor dispute'; rather, application of [the actual malice standard] must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin, supra* at 279. Those policies were summed up by the Supreme Court in *Linn* v. *Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966): "Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, [labor disputes] are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." Such use of language was approved by Congress. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin, supra* at 272. To protect this freewheeling use of language, the United States Supreme Court mandated that the *New York Times* malice standard be pleaded and proved by plain-

tiffs in cases alleging defamation in the context of a labor dispute. *Linn* v. *Plant Guard Workers Local 114, supra* at 64-65.

The plaintiff, responding to this argument, maintains that, as this issue was not raised at trial, the defendants are precluded from raising it here. See *Royal Indem. Co.* v. *Blakely*, 372 Mass. 86, 88 (1977). Further, the plaintiff argues that, since the defendants requested instructions that did not contain the *New York Times* standard, and these requests for jury instructions were granted, they should not be allowed to raise this error on appeal. Cf. *Korb* v. *Albany Carpet Cleaning Co.*, 301 Mass. 317, 318 (1938).

The United States Supreme Court has made it clear that, because the policy evidenced by the Federal labor laws is so important, a court only has "jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." *Linn* v. *Plant Guard Workers Local 114, supra* at 55. The judge's instructions in this case were not a mere error of law. Rather, Congress, in passing the Federal labor laws, "deprived the States of the power to act," *id.* at 59, in a defamation case arising from a labor dispute absent the correct application of the *New York Times* standard. Subject matter jurisdiction may be raised for the first time on appeal, as it "cannot be conferred by consent, conduct or waiver." *Litton Business Syss., Inc.* v. *Commissioner of Revenue*, 383 Mass. 619, 622 (1981). See *Allard* v. *Estes*, 292 Mass. 187, 196 (1935).

Thus, the judge's charge, lacking as it did an instruction that for the plaintiff to prevail on the defamation counts he would have to prove actual malice, constituted reversible error which requires a new trial.[4]

[4] We note that the "*sine qua non* of recovery for defamation in a labor dispute . . . is the existence of falsehood." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 283 (1974). In this case, therefore, there can be no recovery for defamation for a statement which was true.

Our holding that the plaintiff may recover in a State court only if he proves that the defendants published their statements knowing the defamatory matter to be false, or with reckless disregard as to its truth or falsity, negates any necessity to discuss whether the judge's charge as to conditional privilege was correct. The defendants claim that the statements published in the union newspaper were, even if defamatory, privileged. A conditional privilege, however, is lost if abused. One manner of such abuse is publication with knowledge of falsity or with reckless disregard of the truth. Restatement (Second) of Torts § 600 (1977). See *Vigoda* v. *Barton*, 348 Mass. 478, 485 (1965); J.R. Nolan, Tort Law § 101 (1979). Since that is the same standard as must be satisfied for liability to arise in this case, it follows that if "actual malice" is proved, any conditional privilege is thereby proven lost. *Wright* v. *Haas*, 586 P.2d 1093, 1097 (Okla. 1978).

2. *Preemption of the tortious interference claim.* The defendants argue that the plaintiff's claim of tortious interference with employment is preempted by Federal labor law. Although labor law preemption is a difficult field, a careful analysis of Federal law leads to the conclusion that we should hold that in this case Federal labor law does not preempt the plaintiff's cause of action for tortious interference with an employment relationship if the jury finds that a libel made with actual malice was the basis of such interference.

"The question whether federal law 'preempts' state action, largely one of statutory construction, cannot be reduced to general formulas. In evaluating patterns of statutory interaction, the Supreme Court has declared generally that whether challenged state action has been pre-empted turns on whether or not it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Since congressional purposes can be either substantive or jurisdictional, a state action may be struck down as an invalid interference with the federal design either because it conflicts with the actual operation of a federal pro-

gram, or because, whatever its substantive impact, it intrudes upon a field that Congress has validly reserved to the federal sphere." L. Tribe, American Constitutional Law § 6-23, at 377 (1978).

In determining whether Federal law preempts State law, there are three factors to be considered: first, the presence of an overriding State interest; second, whether the underlying conduct (the alleged libel) is protected under the National Labor Relations Act (NLRA); and third, the risk that the State cause of action would interfere with the effective administration of national labor policy. *Linn* v. *Plant Guard Workers Local 114*, 383 U.S. 53, 61-63 (1966).[5]

The United States Supreme Court has indicated that in most circumstances State substantive law should prevail in cases of tortious conduct and in cases of State unemployment benefits. See *Farmer* v. *Carpenters Local 25*, 430 U.S. 290 (1977); *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S. 519 (1979). From a reading of these decisions, we conclude that the preemption doctrine should not be applied if the matter subject to State law does not affect the national labor policies of the NLRA. See, e.g., *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 198 (1978). See also *Attorney Gen.* v. *Travelers Ins. Co.*, 385 Mass. 598, 610-611 & nn. 20-21 (1982); Note, Labor Law — Federal Preemption — The Aftermath of *Sears*, 27 Wayne L. Rev. 313 (1980).

The intentional circulation of defamatory materials in the context of a legitimate labor dispute is not protected activity. See *Farmer* v. *Carpenters Local 25*, 430 U.S. 290, 298 (1977); *Linn* v. *Plant Guard Workers Local 114*, 383 U.S.

[5] Tribe restates the tests of Federal preemption as follows: (1) whether State power conflicts with the power Congress has exercised in the field; (2) whether State power conflicts with that which Congress might have exercised, so called "dormant" power to act in a certain area; (3) whether Congress has legislatively preserved to the Federal government the power to act in a certain area. L. Tribe, American Constitutional Law § 6-23 (1978).

53, 61 (1966); *Dazzo* v. *Local 259, UAW*, 448 F.Supp. 799, 801-802 (E.D. N.Y. 1978); *Davenport* v. *Terry*, 134 N.J. Super. 88 (1975). In *Linn* v. *Plant Guard Workers Local 114, supra*, an employee filed a claim against the union for libel. The libel was published in the context of an organization campaign by the company's employees. Despite the fact that the libel arose in the course of a labor dispute, the Court did not preclude State action but limited "the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Id.* at 64-65. In *International Union, UAW* v. *Russell*, 356 U.S. 634 (1958), the Supreme Court allowed a plaintiff to recover for tortious interference with employment where the complaint was based on unprotected activity (violence). A contrary result is not required by *Local 207, International Ass'n of Bridge, Structural & Ornamental Iron Workers Union* v. *Perko*, 373 U.S. 701 (1963). In *Perko*, the union did not employ any unprotected means in its labor dispute. In *Farmer* v. *Carpenters Local 25*, 430 U.S. 290, 300 n.9 (1977), the Supreme Court ruled that "[u]nder these circumstances, concurrent state-court jurisdiction would have impaired significantly the functioning of the federal system." Since the defendants' conduct in the present case may not have been a protected means, the plaintiff's complaint that the union interfered with his employment by the publication of defamatory material is not preempted. See *International Union, UAW* v. *Russell*, 356 U.S. 634 (1958); 6 Federal Regulation of Employment Service § 44:45, at 48-50 (1980), and cases cited.

The plaintiff's State tort claim, if based on libel made with actual malice, does not affect any national labor policy. "There [is] little risk [here] that the state cause of action would interfere with the effective administration of national labor policy." *Farmer* v. *Carpenters Local 25*, 430 U.S. 290, 298 (1977). "[I]n the absence of compelling congressional direction, we [should] not infer that Congress [has] deprived the States of the power to act." *New York Tel. Co.*

v. *New York State Dep't of Labor*, 440 U.S. 519, 540 (1979), quoting from *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). Our State tort law does not have a greater impact on national labor policy than the New York State law granting unemployment benefits to strikers. See *New York Tel. Co.* v. *New York State Dep't of Labor*, *supra*. Thus, Federal law does not preempt the plaintiff's claim in these circumstances.

Finally, the plaintiff's claim is "a function of the particularly abusive manner in which the [interference with employment] is accomplished . . . rather than a function of the actual . . . [interference] itself." *Farmer* v. *Carpenters Local 25*, *supra* at 305. "If the [plaintiff's] common-law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences of [the intentional circulation of defamatory material], such as [may have been] employed during the [labor dispute] in the present case." *International Union, UAW* v. *Russell*, 356 U.S. 634, 645 (1958).

"[T]he labor movement has grown up and must assume ordinary responsibilities" (*Linn* v. *Plant Guard Workers Local 114*, 383 U.S. 53, 63 [1966]; see *DiLuzio* v. *Electrical Radio & Mach. Workers Local 274*, *ante* 314, 318 [1982]), and, therefore, in the absence of a clear command by Congress or the Supreme Court of the United States, we conclude that our tort law is not preempted.

In order, however, to ensure that the instant claim does not interfere with national labor policy, we make the following observation. To prevail on his tortious interference with employment claim, the plaintiff must both prevail on his libel claim, see part 1, *supra*, and convince the trier of fact that his discharge was due to such unprotected activity.[6]

In conclusion, we reverse the judgments and order a new trial on both the libel and the tortious interference with employment claims.

*So ordered.*

[6] If the plaintiff prevails on the tortious interference claim, it follows that no other privilege was available to the defendants. See *supra* at 728.

## Appendix D

# COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, June 10 1987.

IN THE CASE NO. SJC-4298

AUGUSTINO TOSTI

*vs.*

HENRY AYIK & another

pending in the Superior Court Department of the Trial Court for the County of Middlesex No. 335102

ORDERED, that the following entry be made in the docket; viz.,—

The judgment is affirmed.

BY THE COURT,

/s/ Frederick J. Quinlan, Clerk.

June 10, 1987

See opinion on file.

## Appendix E

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
ROOM 1412 COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8055

JEAN M. KENNETT
*Clerk*

FREDERICK J. QUINLAN
*Assistant Clerk*

July 2, 1987

Louis S. Scerra, Jr., Esq.
Stephanie Pax Flanigan, Esq.
Gary C. Greenberg, P.C.
Goldstein and Manello
265 Franklin Street
Boston, MA 02110

Dear Attorneys: Re: AUGUSTINO TOSTI vs. HENRY AYIK & another
Supreme Judicial Court No. SJC-4298

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Your Petition for Rehearing in the above captioned appeal has been considered by the court and is denied.

Very truly yours,

Dolores G. Dupre
for Jean M. Kennett, Clerk

c.c.: John J. C. Herlihy, Esq.
Karen M. Thursby, Esq.
Herlihy and O'Brien
133 Federal Street
Boston, MA 02110

## Appendix F

## Supreme Judicial Court for the Commonwealth

OFFICE OF THE CLERK, 1412 COURT HOUSE, BOSTON 02108, (617) 725-8055

No. SJC-4298 8/7/87 19___

In re **AUGUSTINO TOSTI** vs. **HENRY AYIK & another**

vs. _____

**MOTION** for Stay of Enforcement of Judgment **ALLOWED.**

Jean M. Kennett, Clerk

**COMMONWEALTH OF MASSACHUSETTS**

MIDDLESEX, ss. SUPERIOR COURT

No. 335102

Augustino Tosti

vs

Francis J. Lynch, et als Indiv. and as
officers of Local 422, United Auto Workers

ORDER

The execution entered in the above captioned case on July 20, 1987 is superseded; the judgment after rescript entered on July 10, 1987 is vacated and the original is to be returned forthwith to this Court.

By the Court
(Hennessey, C.J.)
Supreme Judicial Court

/s/ William P. Johnston

Attest: William P. Johnston
First Assistant Clerk

1987, August 7

per telephone instructions

## Appendix G

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss. SUPERIOR COURT
CIVIL ACTION
NO. 335102

AUGUSTINO TOSTI

vs.

HENRY AYIK & BAHEEGE AYIK
Individually and as Representatives
of Local 422 — United Auto Workers

MEMORANDUM and ORDER

This case came on for hearing on the defendants' motion for new trial on the issue of damages. *See Tosti* v. *Ayik*, 394 Mass. 482 (1985) which was remanded to the Superior Court for consideration of a remittitur or a new trial. The trial judge, Pierce, J., has resigned from the Court. Where he was in a better position than I to evaluate the credibility and weight of the evidence, he was appointed a special master to make recommendations as to a remittitur and report to the Court. He has done so and a copy of his report is attached in which he recommends a remittitur to the amount of Two Hundred Seventy-five Thousand Dollars ($275,000).

In consideration of the foregoing and the Supreme Judicial Court's observations concerning the damage issue, it is ordered that there be a new trial on the issue of damages unless within thirty days from the entry of this order the defendants file an acceptance of the damages as remitted to the amount of Two

Hundred Seventy-five Thousand Dollars ($275,000). If the remittitur is not accepted within that time, the case shall stand for trial on the issue of damages.

/s/ Thomas R. Morse, Jr.
Thomas R. Morse, Jr.
Justice of the Superior Court

Dated: December 11, 1985
Entered: December 13, 1985

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
No. 335102

| | |
|---|---|
| AUGUSTINO TOSTI, | ) |
| Plaintiff | ) |
| v. | ) |
| HENRY AYIK & BAHEEGE AYIK, | ) |
| Individually and as Representatives | ) |
| of Local 422 — United Auto Workers, | ) |
| Defendants | ) |

MEMORANDUM IN SUPPORT OF RECOMMENDED REMITTITUR

Having reviewed the transcripts of the trial, the damage portions of the briefs filed by counsel in the Supreme Judicial Court, and the Supreme Judicial Court decision in this action, I recommend that the jury's award of $495,000 against the Union be remitted to the sum of $275,000. The basis of this recommendation is the following:

1. That absent this incident plaintiff would have remained at General Motors until retirement. The basis of this finding is (a) that plaintiff was approximately 44 years old on the date of his termination; (b) that plaintiff was employed at General Motors for 23 years prior to this incident; (c) that plaintiff had a good employment record at General Motors; and (d) that

plaintiff worked his way up from a hourly wage position to the management position of foreman during his tenure at General Motors.

2. That while no evidence was presented that the libel was communicated to other potential employers, no comparable work in terms of pay was seemingly available for a man of plaintiff's age, experience and skill within a reasonable area of his residence.

3. That plaintiff has made good faith and continuing efforts to find comparable work since the date of his termination.

4. That in view of defendants' conduct, they should not get the benefit of the absence of available comparable work for a person of plaintiff's age and skill.

5. That while no evidence was presented regarding the value of the benefits which plaintiff lost, General Motors did provide, at its expense, plaintiff with the following benefits: (a) Blue Cross/Blue Shield; (b) vision, hearing and dental expenses; and (c) life insurance.

6. That plaintiff was likewise entitled to a pension from General Motors either upon a voluntary retirement after 30 years of service or following a mandatory retirement at age 70.

7. That the quality and standard of plaintiff's life was substantially affected by defendants' conduct. This finding is based on the following: that plaintiff lost his job, the benefits incident thereto, was forced to sell his home, and was unable to find comparable work.

8. That plaintiff lost $100,000 of the income he would have earned in base pay as a General Motors foreman as a result of defendants' conduct.

While I recognize that the sum of $275,000 cannot be substantiated with precision, the law does not require precision. It requires only that the damages be compensatory and not excessive. Moreover, the very nature of the factors which a jury may consider — reputation, standing in the community,

personal humiliation, mental anguish and suffering, damage to employment, standard of life — weigh against precise calculations. In this case, all of the things which plaintiff lost, and as to which he failed to present evidence of value, had a value. Even without evidence of value, it is clear from the record that the loss of these things, other than pay, substantially affected the quality and standard of plaintiff's life. On this record, there could be no doubt as to that. Furthermore, while the evidence of harm to reputation and mental suffering was "sparse", some evidence did exist.

Accordingly, given all of the circumstances which a jury could have considered and the realization that two juries returned verdicts against the defendants in excess of $400,000, I conclude that a remittitur to the sum of $275,000 is appropriate and just.

Respectfully submitted,

/s/ Rudolph F. Pierce
Rudolph F. Pierce, Special Master
LeBoeuf, Lamb, Leiby & MacRae
168 Milk Street
Boston, Massachusetts 02109
(617) 451-1385

Dated: October 10, 1985

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss. SUPERIOR COURT
CIVIL ACTION
NO. 335102

AUGUSTINO TOSTI

vs.

HENRY AYIK & BAHEEGE AYIK
Individually and as Representatives
of Local 422 — United Auto Workers

CORRECTED MEMORANDUM and ORDER

The order of the Court (p. 112) inadvertently misstated that there shall be a new trial on the issue of damages unless the defendants accept a remittitur to the amount of two hundred and seventy-five thousand dollars ($275,000). The correct order is as follows:

It is ordered that there be a new trial on the issue of damages unless within thirty days of the entry of this corrected memorandum and order the plaintiff accepts a remittitur to the amount of two hundred and seventy-five thousand dollars ($275,000).

/s/ Thomas R. Morse, Jr.
Thomas R. Morse, Jr.
Justice of the Superior Court

Dated: January 8, 1986
Entered: January 21, 1986